FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 343

STATE OF NEW YORK, STATE OF DELAWARE, STATE OF INDIANA, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

No. 344

STATE OF MAINE, STATE OF NEW HAMPSHIRE, STATE OF VERMONT, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 345

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BEAVER, MEADE AND ENGLEWOOD RAILROAD COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE STATES OF NEW YORK, DELAWARE, INDIANA, MARYLAND, MICHIGAN, NEW JERSEY, OHIO, WISCONSIN and THE COMMONWEALTH OF PENNSYLVANIA, APPELLANTS

PARKER MCCOLLESTER,
KENNETH L. SATER,
Attorneys for Appellant States.

INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION OF THIS COURT	2
THE STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
1. The Freight Rate Structure and the Freight Rates Involved	4
(a) The territorial divisions	4
(b) The classifications and class rates	6
(c) The exception rates	8
(d) The commodity rates	8
(e) Further facts regarding the class rates and their history	9
2. The Proceedings before the Commission	14
(a) The orders of investigation	14
(b) The hearings before the Commission	14
(c) The evidence	15
(d) The Commission's decision and orders	17
3. The Decision of the Court Below	21
4. The Historical Background of the Proceeding	22
5. The Principal Issues	28
SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED	31
SUMMARY OF ARGUMENT	31
ARGUMENT:	
Introduction	39
A. Some general comments upon the nature and scope of, and the limitations upon, the authority and functions of the Commission	39
B. Plan of this argument in the light of the nature of the issues	45
C. Some important factual considerations	47

PAGE

POINT I—The orders of the Commission requiring a 10 per cent increase in class rates for transportation within official territory are invalid as an attempted exercise by the Commission of authority to prescribe minimum reasonable rates, and its ultimate determination that the then existing class rates previously prescribed by the Commission as maximum reasonable rates were less than minimum reasonable rates in violation of Section 1, paragraphs (4) and (5) (a) of the Interstate Commerce Act was arbitrary and invalid because not supported by essential preliminary findings and because without support of substantial evidence 54

A. The Law 54

B. There is no finding and no evidence to support a finding that the class rates for transportation between points in Official territory are not fully compensatory. Indeed both the evidence and the Commission's findings require the conclusion that the class rates which the Commission ordered increased 10 per cent were already highly profitable 58

C. There is no finding and no evidence to support a finding that the level of the class rates for transportation within Official territory threatens a rate war or otherwise will tend to impair the financial integrity of the carriers 64

D. The Commission's finding predicated upon the returns from Operations of the Carriers in the several territories, that "the revenue needs of the carriers in official territory with respect to their class-rate traffic are greater than is the case as to the class-rate traffic of the carriers in the other territories" is not a finding that the class rates for transportation in Official territory are non-compensatory, sufficient to sustain a minimum rate order requiring an increase in those rates.. 65

PAGE

POINT II—To the extent that the orders purport to rest upon a determination that the present class rates create undue prejudice and preference in violation of Section 3(1) of the Interstate Commerce Act, the orders are arbitrary and invalid because not supported by essential preliminary findings and because without support of substantial evidence. The court below erred in not so deciding 69

A. The Law 70

B. There is no finding and no evidence to support a finding that for the transportation of the same kinds of freight from the South and West to Official territory on which class rates are charged within Official territory the railroads demand corresponding class rates. In fact both the findings and the evidence are to the contrary 76

C. The Commission's findings negative any conclusion that the differences in the levels of the class rates are the cause of substantial injury, prejudice and disadvantage to shippers or receivers of freight in the South and West or to those territories as a whole and of preference and advantage to Official territory and shippers therein 80

D. If portions of the Commission's reports are to be interpreted as constituting a finding that the class rates in Official territory and those for transportation from other territories into Official territory are controlled by similar circumstances and conditions, such a finding is arbitrary, contrary to the evidence, and inconsistent with other statements or findings made by the Commission 96

POINT III—The Court below and the Commission erred in concluding that the amendment to Section 3(1) of the Interstate Commerce Act by the Transportation Act, 1940 coupled with Section 5(b) to the latter Act so changed the law as to require and sustain the Commission's decision and orders 98

PAGE

POINT IV—The Commission's determination that the class rates are unlawful because not on a uniform level and that the class rates for transportation within Official territory should be increased to approach uniformity is not supported by preliminary findings of fact or by the evidence, and the factual considerations stated by the Commission do not sustain its conclusion 110

A. The Commission's findings as to average cost of transportation and the evidence on this subject do not support the decision and orders 112

B. The fact that there are differences in the kinds of freight, transported within the several territories does not support of the Commission's orders. On the contrary, the evidence as to socalled "consists" of traffic in the several territories precludes an ultimate finding that the class rates are unlawful because not uniform 127

C. The Commission's orders are not supported by the references to the small proportions of freight moving at class rates in the South and West and interterritorially 130

D. The fact that the average rate of return of the railroads in Official territory has been slightly less in recent years than the corresponding average figures for the railroads of the South and West does not support the ultimate finding of undue prejudice and preference in violation of Section 3(1) or the finding that the present class rates in Official territory are less than minimum reasonable rates in violation of Section 1(4) and (5)(a) and does not justify the orders requiring an increase in the latter rates... 132

POINT V—The orders, in requiring a 10 per cent increase in the class rates for transportation in Official territory, in view of the compensatory character of the existing rates, violate Section 15a(2) of the Interstate Commerce Act 134

PAGE

POINT VI—The orders are beyond the authority of the Commission, arbitrary and discriminatory in that they would require shippers and receivers in Official territory to pay increased freight rates for the benefit of the railroads in the South. The lower Court erred in not so deciding 135

POINT VII—The Commission's orders represent an attempt to alter economic and industrial conditions and for that reason are beyond the authority of the Commission 138

POINT VIII—To the extent that the orders rest on a finding of undue preference and prejudice in violation of Section 3(1) they are invalid because they do not leave the carriers an alternative as to the method of removing the rate differences 142

POINT IX—The Court below erred in failing to hold that the evidence does not support the orders which are to take effect in the postwar period, and that the Commission erred in refusing to reopen the proceeding to take evidence as to the present and probable future conditions 147

POINT X—The recent decision and order of the Commission in Ex Parte 162, *Increased Railway Rates, Fares and Charges, 1946*, and the general increases in their freight rates made by the railroads pursuant thereto, have completely altered the rate situation to which the Commission's orders in the *Class Rate Case* were directed and have made those orders obsolete and impossible of enforcement according to their terms so that they should be set aside and permanently enjoined 151

CONCLUSION 156

APPENDIX A: Excerpts from Pertinent Statutes 158

APPENDIX B: Excerpts from Findings in Ex Parte 162 161

APPENDIX C: Interstate Commerce Commission's Order in Ex Parte 162 163

Table of Cases Cited

PAGE

Abingdon Sanitary Mfg. Co. Inc. v. Akron C. & Y. Ry. Co., 208 I. C. C. 661 9
Adams Lbr. Co. v. Akron C. & Y. Ry. Co., 253 I. C. C. 179 72
Alabama Rock Asphalt, Inc. v. Abilene & S. Ry Co., 176 I. C. C. 555 73
Alexandria Paper Co. v. Atchison, T. & S. F. Ry. Co., 171 I. C. C. 252 72
Alpena Leather Corp. v. Pennsylvania R. Co., 185 I. C. C. 106 9
Anchor Coal Co. v. United States, 25 F. (2d) 462 ..32, 33, 34, 43, 75, 140
Ann Arbor R. Co. v. United States, 281 U. S. 658 ....36, 108
Atchison Ry. v. United States, 295 U. S. 193 41
Atchison, T. & S. F. Ry. Co. v. United States, 284 U. S. 248 ..... 36, 108, 149

Baltimore & O. R. Co. v. United States, 298 U. S. 349 ..... 36, 121
Bituminous Coal to Youngstown, 197 I. C. C. 617 ... 144
Board of Trade of Carrollton, Ga. v. Central of Georgia Ry. Co., 28 I. C. C. 154 75
Boston Wool Trade Asso. v. B. & A. R. R. Co., 78 I. C. C. 178 72

Calif. Growers' & Shippers' Protective League v. S. P. Co., 129 I. C. C. 25 ..... 36, 120
Carbon Limestone Co. v. Pennsylvania R. Co., 173 I. C. C. 167 73
Central R. R. Co. of New Jersey v. United States, 257 U. S. 247 ..... 35, 75
City Ice & Supply Co. v. C. & N. W. Ry., 36 I. C. C. 514 72
Class Rate Investigation 1939, 262 I. C. C. 447; 264 I. C. C. 41 ..... 2, 14
Clover Splint Coal Co. Inc. v. Louisville & N. R. Co., 197 I. C. C. 276 75
Colorado Interstate Gas Co. v. Federal Power Com'n., 142 F. (2d) 943 43
Commonwealth of Kentucky v. Ahnapee & W. Ry. Co., 213 I. C. C. 297 ..... 36, 120
Consolidated Freight Classification, 262 I. C. C. 447; 264 I. C. C. 41 ..... 2, 14

PAGE

Dewey Portland Cement Co. v. Alton & E. R. Co., 176 I. C. C. 671 72

Eastern Class Rate Investigation, 164 I. C. C. 314 ..... 9, 10, 11, 48, 49, 51, 64, 97
Eastern Class Rate Investigation, 171 I. C. C. 481, 177 I. C. C. 156, 203 I. C. C. 357 48

Florida v. United States, 282 U. S. 194 ..... 32, 33, 44, 67
Florida v. United States, 292 U. S. 1 ..... 34, 67

Gwinn Milling Co. v. Pennsylvania R. Co., 255 I. C. C. 690 74

House Heating Furnaces From The East to The Pacific Coast, 255 I. C. C. 787 74
Hurst v. Boise Valley Traction Co., 146 I. C. C. 625 71

Increased Railway Rates, Fares and Charges, 1946 Ex Parte 162 ..... 30, 38, 58, 151
Indianapolis Freight Bureau v. Cleveland C. C. C. & St. L. Ry. Co., 23 I. C. C. 195 71
I. C. C. v. Columbus & Greenville Ry., 319 U. S. 551 .. 30, 40
I. C. C. v. Diffenbaugh, 222 U. S. 42 141
Int. Comm. Comm. v. Inland Waterways Corp., 319 U. S. 671 146
Int. Com. Com'n v. Louisville & Nash R. R., 227 U. S. 88 ..... 32, 42

Jefferson Island Salt Mining Co. v. United States, 6 F. (2d) 315 55

Mason City Brick and Tile Co. v. C., M. St. P. & P. R. Co., 258 I. C. C. 312 73

New Automobiles in Interstate Commerce, 259 I. C. C. 475 56
Nor. Pac. R. v. Dept. Public Works, 268 U. S. 39 . 36, 120
North Carolina v. United States, 325 U. S. 507 ..... 34, 68
Northeastern New York Traffic Assn. v. Delaware & H. R. Corp., 200 I. C. C. 134 73

Paper and Paper Articles to New Orleans, 96 I. C. C. 600 72
Pensacola Chamber of Commerce v. L. & N. R. R. Co., 98 I. C. C. 567 71

PAGE

Pure Oil Co. v. Atlantic Coast Line R. Co., 256 I. C. C. 723 74

Scandrett v. United States, 32 Fed. Supp. 995; affd. 312 U. S. 661 55
Smith Bros. Mfg. Co. v. Aberdeen & R. R. Co., 181 I. C. C. 137 72
Southern Class Rate Investigation, 100 I. C. C. 513 10
State of Alabama v. New York Central R. Co., 235 I. C. C. 255 (Southern Governors Case) 23, 88
Southern Pac. Co. v. Interstate Comm. Comm., 219 U. S. 433 .....32, 44, 141
State of New York v. United States, 65 F. Supp. 856 2
Stoves, Ranges, Boilers and House-Heating Furnaces, 182 I. C. C. 59 140

Texas & Pacific Ry. Co. v. United States, 289 U. S. 627 .....33, 34, 35, 56, 71, 75, 141, 142, 143, 145, 146
Transportation Act 1940, Section 5(b) 94

United States v. Abilene & So. Ry. Co., 265 U. S. 274 43
United States v. Carolina Freight Carriers Corp., 315 U. S. 475 .....32, 42
United States v. Chicago, M. St. P. & P. R. Co., 294 U. S. 499 .....31, 32, 33, 34, 40, 41, 66, 81, 146
United States v. Director General, 80 I. C. C. 143 74
United States v. Gulf Refining Co., 268 U. S. 542 9
United States v. Illinois Cent. R. R., 263 U. S. 515 .....31, 34, 39, 75, 141, 146
United States v. Seatrain Lines, Inc. (Decided January) 48

Western Carolina Shippers' Assn. v. Asheville S. Ry. Co., 174 I. C. C. 353 72
Western Trunk Line Class Rates, 164 I. C. C. 1 10, 11, 36, 97, 119
Western Trunk-Line Class Rates, 204 I. C. C. 659 97

Youngstown Sheet & Tube Co. v. United States, 295 U. S. 476 .....143, 144, 145, 146

Congressional Record, Vol. 84, Part 6, p. 5889 25, 104, 107
Congressional Record, Vol. 84, Part 6, p. 5890 105
Congressional Record, Vol. 84, Part 9, p. 9712 105
Congressional Record, Vol. 86, Part 17, p. 5555 26

STATUTES

PAGE

Interstate Commerce Act (24 Stat. 379), as amended (U. S. C. Title 49)
Sections 1(4) and 5(a) 3, 17, 28, 32, 37, 40, 46, 54, 55, 58, 59, 61, 68, 69, 111, 132, 146, 148
Section 2 74
Section 3(1) 3, 17, 32, 34, 36, 37, 46, 70, 71, 73, 74, 75, 76, 80, 97, 100, 101, 102, 105, 108, 132, 142
Section 15(1) 3, 143, 146, 147, 159
Section 15a(2) 3, 38, 66, 67, 108, 134, 135, 160

Transportation Act, 1940, Section 5(b) (54 Stat. 905) (U. S. C. Title 49, 1946, Supp., footnote to Section 3(5)) 3, 36, 70, 97, 98, 100, 101, 103, 160

Hoch-Smith Joint Resolution (43 Stat. 801) (U. S. C. Title 49, Section 55) 36

Supreme Court of the United States

OCTOBER TERM, 1946

No. 343

STATE OF NEW YORK, STATE OF DELAWARE, STATE OF INDIANA, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

No. 344

STATE OF MAINE, STATE OF NEW HAMPSHIRE, STATE OF VERMONT, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 345

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BEAVER, MEADE AND ENGLEWOOD RAILROAD COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE STATES OF NEW YORK, DELAWARE, INDIANA, MARYLAND, MICHIGAN, NEW JERSEY, OHIO, WISCONSIN and THE COMMONWEALTH OF PENNSYLVANIA, APPELLANTS

These are three appeals from a decision and decree of a statutory three-judge court for the Northern District of New York denying a permanent injunction to set aside and annul certain orders of the Interstate Commerce Commission. The orders of the Commission would require a revision in the so-called class rates of the applicable railroads for transportation in all that part of the country east of the Rocky Mountains. More particularly, in so far as these appellants are concerned, the Commission's orders would require the class rates for transportation in so-called Official territory in which these States are included to be increased 10 per cent. At the same time it would require a 10 per cent reduction in the class rates for transportation in the South and West and from points in those territories to Official territory.

Opinions Below

The opinion of the specially constituted District Court (R. 1411, *et seq.*) is reported in *State of New York* v. *United States*, 65 F. Supp. 856.

The decisions and orders of the Interstate Commerce Commission (R. 62-386, 429-486), to review which the actions were instituted in the court below, were rendered in Docket No. 28300, *Class Rate Investigation 1939*, and Docket No. 28310, *Consolidated Freight Classification*. These proceedings were heard on a consolidated record and the Commission's decisions therein are reported in 262 I. C. C. 447 and 264 I. C. C. 41. For brevity, the consolidated proceeding is hereinafter generally referred to as the *Class Rate Investigation*.

Jurisdiction of This Court

The action in the court below was brought under the provisions of acts approved June 10, 1910 (38 Stat. L.

1949) and October 23, 1913 (38 Stat. L. 219) commonly referred to as the Commerce Court Act and the Urgent Deficiencies Appropriations Act, all as re-enacted in Title 28 U. S. C. A., Section 41(28) and Sections 43 to 48, inclusive, having to do with suits brought to enjoin and set aside orders of the Interstate Commerce Commission. The direct appeals from the final decree of the court below were taken to this Court under the provisions of U. S. Code, Title 28, Sections 47a and 345.

Probable jurisdiction was noted by this Court on October 14, 1946 (R. 1527)*.

The Statutes Involved

The statutory provisions involved are Section 1(4) and (5)(a), Section 3(1), Section 15(1) and Section 15a(2) of the Interstate Commerce Act (U. S. C., Title 49) and Section 5(b) of the Transportation Act, 1940 (U. S. C., Title 49, footnote following Section 3(5) in 1946 supplement, 54 Stat. 902) commonly referred to as the Ramspeck Resolution. These provisions are reproduced in Appendix A hereto.

Statement of the Case

Appellants in No. 343 (the nine States for whom this brief is filed) (R. 1, *et seq.*) and appellants in No. 345, the Western railroads (R. 833, *et seq.*) instituted independent suits in the court below, each seeking an injunction to set aside and annul the Commission's decisions and orders in the *Class Rate Investigation*. The States of New York and Ohio intervened in the railroads' suit (R. 864, 865), and the railroads intervened in the suit of the States (R. 489,

* Figures in parentheses preceded by "R." refer to pages of the printed record.

490). The appellants in No. 344, the New England governors, did not file a separate petition in the court below but intervened as plaintiffs in both suits (R. 512, 866). The foregoing actions were consolidated for hearing before the court below (R. 881).

1. The Freight Rate Structure and the Freight Rates Involved

(a) *The territorial divisions*

In the course of the development of railroad transportation and the growth of railroad systems, the country, for the purposes of railroad freight rates and certain other matters, has come to be divided into sections or so-called rate or classification "territories". The boundaries of these territories conform generally, but with exceptions, with termini of the major railroad systems, so that each territory embraces the railroads which are chiefly competitive each with the other and are affected by common physical, traffic and other conditions.

Official or Official Classification Territory, so-called, is roughly that portion of the United States north of the Ohio and Potomac Rivers and east of the western shore of Lake Michigan and of a line extending diagonally to the western bank of the Mississippi River opposite Illinois. Southern or Southern Classification Territory is that section of the country roughly south of the Ohio and Potomac Rivers and east of the Mississippi. Western Classification or Western territory includes the part of the country west of the Mississippi River and also part of Wisconsin. Western Classification Territory is, for certain purposes, subdivided into Western Trunk Line, Southwestern and Mountain-Pacific territories, and there are subdivisions of the other territories which are not material here (R. 4926a).

MAP A
THE FIVE PRINCIPAL RATE TERRITORIES IN THE UNITED STATES
WASHINGTON
OREGON
IDAHO
MONTANA
WYOMING
NORTH DAKOTA
MINNESOTA
WESTERN TRUNK LINE TERRITORY
MOUNTAIN-PACIFIC TERRITORY
NEVADA
CALIF
UTAH
COLORA
NEBRASKA
IOWA
KANSAS
MISSOURI
WISCONSIN
MICHIGAN
ILLINOIS
INDIANA
OFFICIAL TERRITORY
PENNSYLVANIA
WEST VIRGINIA
MD
DEL
VIRGINIA
KENTUCKY
MAINE
CONN
ARIZONA
NEW MEXICO
OKLAHOMA
ARKANSAS
TENNESSEE
NORTH CAROLINA
SOUTH CAROLINA
SOUTHWESTERN TERRITORY
TEXAS
SOUTHERN TERRITORY
MISS.
ALABAMA
GEORGIA
FLORIDA

These major divisions are illustrated on the map on the opposite page, which is a reproduction of an exhibit in the record (Ex. 1, R. 4911).

As will be seen, the nine appellant States and New England are embraced in Official territory, except that portions of Michigan and Wisconsin are in Western territory.

(b) *The classifications and class rates*

The freight rates of the railroads, so far as is here pertinent, may be divided into three general categories commonly referred to as "class rates", "exception rates" and "commodity rates."

Corresponding with the foregoing divisions of the country, the railroads of the country publish and maintain in schedules filed with the Commission three major freight classifications, so-called, known respectively as the Official, Southern and Western Classifications. In these classifications many thousands of articles of freight are listed and are assigned to classes—for example, first class, second class, etc.—for the purpose of determining the freight rates to be charged for transportation by railroad. Then by other tariff schedules filed with the Commission the several railroads publish and maintain freight rates to be charged for the transportation of freight of each of the several classes between practically all points. It is these rates which are known as the class rates.

The Official Classification and the Official Territory class rates are published and maintained by and determine the charges of the railroads for the transportation of classified or class rate freight within Official Territory. The Southern and Western classifications and class rates as their names indicate, determine charges for the transportation of class rate freight within Southern and Western Classification Territories. The tariffs contain rules specifying which classifications determine the ratings and rates for transportation from one territory to another.

For purposes of publication, all three classifications are combined in one volume, called the Consolidated Freight Classification, with uniform rules, regulations and definitions of various articles listed. The classifications or ratings to which many of the articles are assigned, are not uniform in the several classifications. For example, an article may be classified third class in the Official, fourth class in the Southern, and fifth class in the Western Classifications.

As will be pointed out in more detail presently, the class rates are actually charged upon a negligible proportion of the freight transported in Southern and Western territories because the railroads for transportation in these territories have provided lower exception or commodity rates. For transportation within Official territory, however, the class rates are actually charged upon a substantially greater proportion of the total freight and upon a much larger actual volume.

The first class rates, or the rates provided for transporting articles classified first class, are what may be described as the basic class rates, since the rates for the transportation of freight classified in the other classes bear percentage relationships to the first class rates. Formerly the other classes were generally described as second class, third class, etc., but the rates for these classes reflected uniform percentages of the first class rates in each territory, although the percentage relationships between the first class rates and the rates for other classes were not always uniform in all territories (R. 55). More and more, however, it has become the custom to refer to the rates or ratings for classes other than first as column rates or ratings, each column representing a percentage figure, such as column 85, which is 85 per cent of first class, column 35, which is 35 per cent of first class, etc. Thus the number of classes is subject to indefinite expansion to correspond with the number of possible percentage relationships to first class.

It is the class rates to which the orders here in suit are addressed and therefore the facts concerning these rates must be more fully described, which will be done after reference to the other categories of rates.

(c) The exception rates

As their name implies, the exception rates are rates which the railroads have provided for the transportation of freight for which the class rates, for one reason or another, are not considered suitable and for which, therefore, exceptions of rather general application are desired. To this end the railroads publish tariffs providing exceptions to the classification, which provide that either generally throughout a territory or between various points the articles specified, instead of being classified in accordance with the classification ratings, will be classified at lower percentages of first class and will be charged freight rates accordingly.

(d) The commodity rates

The so-called commodity rates are rates which are established for the transportation of specified commodities between particular points. They are often established for articles which are transported in great volume between certain origins and destinations but do not move generally throughout the country. There are many commodity rates for the transportation of raw materials and low grade freight (p.* 564, R. 179; p. 569, R. 184; pp. 593-604, R. 209-219).

A shipper is entitled to the lowest freight rate which the railroads maintain for the transportation of his goods and where there are several different rates in the tariffs

---

* Figures preceded by "p." indicate pages in the printed reports of the Commission involved in this proceeding, except where the context indicates otherwise.

for the transportation of the same commodity between the same points the lowest rate is ordinarily the one which is applicable. *United States* v. *Gulf Refining Co.*, 268 U. S. 542.

Hence, although almost every conceivable commodity, other than bulk freight such as coal, is classified in the classifications, so that theoretically there are class rates for its transportation, the class rates are not the rates which are actually charged if the railroads' tariffs provide exception or commodity rates which are lower.

(e) Further facts regarding the class rates and their history

Rates which are merely maintained in tariffs but are not actually charged, because the transportation is provided with lower rates, are commonly referred to as paper rates. *Alpena Leather Corp.* v. *Pennsylvania R. Co.*, 185 I. C. C. 106, 107; *Abingdon Sanitary Mfg. Co., Inc.* v. *Akron C. & Y. Ry. Co.*, 208 I. C. C., 661, 664.

To a very large extent, as has been indicated and as will be shown more fully presently, the class rates are only paper rates in so far as transportation within the South and West and from those territories to Official territory is concerned. Within Official territory, however, the class rates, which the Commission's orders would require to be increased 10 per cent, are rates actually charged on 5.8 percent of the total large volume of carload freight transported within that territory (R. 179, p. 564).

The class rates within Official territory, which the Commission now finds to be less than minimum reasonable rates and orders increased 10 per cent, and the class rates within Southern and Western territories, which the Commission now finds to be excessive and orders reduced 10 per cent, were all prescribed by the Commission itself after extended investigations. *Eastern Class Rate*

Investigation, 164 I. C. C. 314; *Southern Class Rate Investigation*, 100 I. C. C. 513; *Western Trunk Line Class Rates*, 164 I. C. C. 1.

Mile for mile the class rates within Official territory are lower than the class rates within the other territories. Treating the Official territory first class rates as 100 per cent, a table on page 569 (R. 184) of the Commission's report shows that the averages of the first class rates in the other territories for various distances up to 1,000 miles reflect the following percentages of the averages of the Official territory rates:

Southern	137.7 per cent
Western, Zone I	129.6 per cent
Western, Zone II	144.4 per cent
Western, Zone III	159.4 per cent

The class rates within the several territories were, as the Commission's reports in the cases referred to indicate, prescribed in the light of the rate structures, the traffic, transportation and competitive conditions found to exist in each territory. In Official territory the commodity rates charged for the transportation of many raw materials and low-grade manufactured articles are substantially higher than the corresponding commodity rates which the Southern railroads have provided for shippers and receivers in that territory, and the class rates in Official territory generally applicable to the transportation of manufactured articles were made relatively lower in consideration of this fact.

Likewise, the Commission in the *Eastern Class Rate* case, in prescribing the class rates in that territory, was influenced by the fact that the class rates are actually charged on a very large volume of freight which in the South and West is provided with commodity or exception rates which are lower than the class rates in those territories. In these respects the circumstances and the purpose of the class

rates in Official territory were noticeably different from conditions in the other territories, where lower commodity and exception rates have been provided for a large proportion of the movement of freight and the class rates are really a negligible part of the rate structure so far as being actually charged.

The Commission remarked upon these important differences in the *Eastern Class Rate* case, saying (p. 391):

> " * * * In the other territories class rates, at least in the past, appear to have been of particular interest to jobbers, and the traffic which they move seems to have been, and perhaps still is, predominantly less than carload. For carload traffic of any important volume commodity rates have generally been provided. This is not the situation in official territory, where a great deal of very important carload traffic moves on class rates. Of the traffic embraced by the revenue test about 68 per cent was carload. Among the commodities which generally move in carloads on class rates in official territory but are given commodity rates in other territories are fruits and vegetables (including apples, cabbage, and potatoes), dairy products, vegetable oils, furniture, wrapping paper, soap, sash, doors, and blinds.
>
> "A corollary of this situation is that, as compared with the class rates, the commodity rates on heavy, low-grade articles in official territory are often relatively high and in the other territories relatively low. While it is difficult to determine the fact with exactness, it is quite clear from general knowledge, and also from evidence here of record, that the spread between the class rates in official territory and those in effect in the South and West is not an accurate index of the differences in general average rate levels, the latter differences being relatively considerably less."

The Commission in the *Western Class Rate* case said (p. 188):

> "Class rates in w.t.l. territory appreciably higher than in official territory are justified also by the nature

and volume of the articles moving under such rates in the respective territories. Many articles handled in enormous volume pay class rates in official territory, whereas in w.t.l. and southern territories they enjoy commodity rates lower than the corresponding class rates. This in a large measure will account for and warrant relatively low class rates in official territory as compared with other territories."

The following table on page 564 of the Commission's report (R. 179) which was based upon Exhibit 228 (R. 11834) and reflected a study of all carload traffic transported on September 23, 1942, shows the proportions of carload traffic upon which the different categories of rates were charged for transportation in the several territories and interterritorially:

Territories (within, or from one to another)	Percent of carloads		
	Class rates	Exception rates	Commodity rates
Official	5.8	17.6	76.7
Southern	1.8	6.0	92.2
Western trunk line	.6	.2	99.2
Southwestern	2.4	4.4	93.2
Official to southern	12.6	36.3	51.1
Southern to official	.9	4.9	94.2
Official to western trunk line	12.3	35.4	52.3
Western trunk-line to official	3.1	1.0	95.9
Official to southwestern	22.5	52.0	25.5
Southwestern to official	1.5	3.4	95.9
Southern to western trunk line	1.5	13.5	85.0
Western trunk line to southern	6.1	3.1	90.8
Southern to southwestern	6.1	22.1	71.8
Southwestern to southern	1.2	4.3	94.5
Western trunk line to southwestern	13.0	6.2	80.8
Southwestern to western trunk-line	2.0	3.0	95.0

It will be seen from this table, as will be reiterated hereafter, that the shippers and receivers of freight in the appellant States would be subjected by the Commission's orders to a 10 per cent increase in their freight charges on 5.8 per cent of the total large volume of car-

load traffic moving in Official territory for the ostensible purpose of bringing about an approach to uniformity with class rates which are charged upon less than one per cent of the total carload traffic transported within the West and only 1.8 per cent of that in the South. This is because the railroads have provided lower exception or commodity rates which are actually charged for transportation in those territories of freight for whose transportation in Official territory the class rates are charged.

It follows, therefore, that the differences in the levels of the first class rates afford no indication as to the comparative levels of the freight rates actually charged for the transportation of the same or similar freight in the several territories.

Moreover, even where the class rates are charged for transportation in the South and West, it frequently happens that the articles are accorded lower classification ratings than in Official territory, so that the resulting rates may be as low as or lower than those charged for the transportation of the same freight within Official territory (R. 123, p. 508).

Furthermore, the differences in the levels of the class rates were influenced by the marked differences in the kinds and volumes of freight transported in each territory. The railroads in each section of the country are necessarily dependent for their livelihood upon the freight originating or terminating in that section and differences in the kinds and quantities of freight to be transported mean differences in the sources of their revenues and in the amounts which they must derive from each kind of freight. Not only are there different kinds and quantities of freight by which the total expense of railroad maintenance and operation must be borne, but the differences invite different theories of rate structure, and these have occurred (R. 1753-1785; 3621-3636; Ex. 15, R. 6037; Ex. 16, R. 6179).

2. The Proceedings before the Commission

(a) *The orders of investigation*

The proceedings resulting in the promulgation of the orders in question were instituted by the Commission on its own motion by two orders dated July 29, 1939 (R. 55, 57) subsequently amended by two orders dated August 1, 1940 (R. 59, 60). The Commission designated its investigation as Docket No. 28300, *Class Rate Investigation, 1939*, and Docket No. 28310, *Consolidated Freight Classification*. Substantially all of the railroads of the country were made respondents in the investigation.

By its orders in Docket No. 28300 (R. 55, 59) the Commission instituted an investigation into the lawfulness of the present class rates for transportation between all points within that portion of the United States east of the Rocky Mountains, and the Commission indicated that the principal matters to be investigated pursuant to these orders were whether or not there should be a uniform scale of class rates to be charged for transportation throughout the portion of the country described, or whether there should be several scales of class rates in different sections of the country and, if so, the relationships which should exist between them. By its orders in Docket No. 28310 the Commission instituted an investigation into the lawfulness of the freight classifications in effect throughout the entire United States and indicated that the principal issues to be investigated were whether or not there should be a single uniform classification, or whether there should be different classifications and, in either event, what the different classifications and the ratings therein should be (R. 57, 60, 70).

(b) *The hearings before the Commission.*

In due course, extended hearings were held before the Commission at various points. Many witnesses were

heard, including members of the Commission's own staff, officials of railroads, rate experts and statisticians, professors, economists or so-called economists, operators of freight rate bureaus, Governors and other public officials, representatives of many Southern industries who opposed nationwide uniformity of rates, spokesmen for chambers of commerce, and a few shippers who had something to complain of but who generally on cross examination proved to be prospering under the existing rate adjustment.

Following the hearings, many briefs were filed and oral argument was had before the Commission. Contrary to the Commission's usual custom in proceedings of this sort, no recommended report and findings of its Examiners were submitted to the parties for the purpose of consideration and exception.

(c) *The evidence.*

For the convenience of the Court, if it can be called a convenience, the entire record of the testimony and exhibits before the Commission which was filed in the lower court has been printed. As so printed, it consists of 21 volumes with a total of 12,719 pages. Obviously, it would extend this brief beyond all reasonable limits to attempt herein an abstract or even the most summary resumé of the evidence.

Appellants are quite aware of the demands upon the credulity of the Court which are involved in their contention that a record of this magnitude does not contain evidence to support the Commission's orders. However, this contention is most emphatically urged and it is believed that the Court's weighing of its validity and examination of the evidence for this purpose will be eased if detailed discussion of the evidence and, more particularly, reference to the deficiencies in the record are reserved for the argument. For, as appellants submit, the issues involved are such that the character of evidence

required to sustain the Commission's orders is quite definitely established by the law, and the complete absence of such evidence can be pointed out and ascertained without attempting to summarize the evidence as a whole.

One large part of the record can be disposed of in so far as this case is concerned because of the fact that it relates to the question of the desirability or possibility of a uniform freight classification. The Commission's orders contain no requirement as to the classifications and therefore this evidence has no direct bearing upon the issues here. Another large segment relates to the so-called Florida arbitraries, which do not play a part in this suit.

To be sure, the record contains a vast amount of testimony and statistics of miscellaneous facts, such as the size and volume of mineral deposits, the views of theorists as to the economic ills of the country, the causes therefor and their cure, and a great many tables of freight rates of different kinds.

However, of evidence that the class rates for transportation in Official territory are not remunerative, that they threaten a rate war or breakdown of the financial integrity of the railroads, or of proof of the costs of transporting freight upon which the class rates are charged (as distinguished from average tonnage costs of all transportation) there is a complete lack. There is also an almost total absence of proof that the same freight upon which class rates are charged in Official territory moves at class rates in the South and West, and indeed the evidence is to the contrary. There is no proof that differences in the levels of class rates have ever prevented the location of an industry in the South, and there is proof to the opposite effect. In short, on these matters which, as appellants claim, are vital to sustain the Commission's orders, there is an absence of evidence—and obviously a lack of evidence cannot be summarized. The one relevant point upon which

there is question as to the sufficiency of the evidence that was received is as to the effect of the differences in class rate levels upon shippers in the South and West and their ability to ship in competition with producers in Official territory. But on this point, the Commission has fully reviewed and weighed the proof in its report, and its findings certainly require the conclusion that the evidence fails to establish the existence of substantial injury as a result of the rate differences, which it is submitted that the law requires to sustain a determination that rates are unlawful in violation of Section 3 of the Act.

(d) *The Commission's decision and orders.*

On May 15, 1945, with Commissioners Mahaffie and Patterson concurring only in part and Commissioners Porter and Barnard filing vigorous dissents, the Commission promulgated its first decision, embodied in its report herein (R. 62, 262 I. C. C. 447) and issued its basis order, which is one of the orders sought to be enjoined.

Without reviewing the Commission's main report and order at length at this point, it is enough to say that the Commission found, first, that a uniform freight classification for the entire country would be desirable but that it would require a long time for its preparation and it therefore made no order with regard thereto. It then found that the class rates to be charged in connection with the uniform classification should be upon a uniform basis, distance considered, throughout the entire portion of the country east of the Rocky Mountains and that the present class rates in the several territories were unlawful in violation of Sections 1 and 3 of the Act because of their lack of uniformity. In other words, the class rates for transportation in Official territory previously prescribed by the Commission as maximum reasonable rates were found to be unlawful because lower than the class rates in the South and West, and the class rates in the South and West were found to be unlawful because higher than the class rates within Official terri-

tory, and the class rates for the different sections of Western territory were found to be unlawful because on different levels. The Commission determined and set out in its report a mileage scale to be the basis of the uniform class rates to be established. However, it concluded that uniform rates in accordance with this scale could not be brought about until a uniform classification could be made ready. Meanwhile, it concluded that there should be an "approach" to uniformity and to this end it determined that the class rates for transportation within Official territory were unlawful to the extent that they were less than 10 per cent higher than their present levels and that the class rates for transportation in the South and West were unlawful to the extent that they were higher than 10 per cent below their present levels. By its order it directed that the class rates in Official territory be increased 10 per cent and that the class rates for transportation in the South and West and from those territories to Official territory should be reduced 10 per cent.

Commissioner Porter, in his dissenting expression said (p. 712, R. 327):

> "In my opinion, the record falls far short of supporting the finding that to be just and reasonable, and free from undue prejudice and preference, the class rates throughout the area east of the Rocky Mountains must be placed in the strait-jacket of a uniform distance scale."

Commissioner Barnard in his dissent said (pp. 725 and 728; R. 340, 343):

> "I am of the opinion that the record in this proceeding does not support or warrant the findings and conclusions reached by the majority and, therefore, I dissent."
>
> * * * * *
>
> "I am unable to find in this record sufficient evidence to support the claim of the Southern Governors Conference that the class rate structures within the

South and between the South and official territory have restricted the industrial growth of the South and have favored and stimulated the growth of industry in the North. On the contrary, the evidence shows that the South has progressed industrially during the last decade much more rapidly than any other section of the country. Furthermore, the evidence fails to convince me that the products of the South cannot compete with the products of official territory in that territory, but for the purpose of the argument, let it be assumed that the contrary is true. Nevertheless, if true, it does not come about because of the difference in the class rates but is due to other causes which have no connection whatever with these rates."

Commissioners Mahaffie and Patterson concurred with the majority only in part. Commissioner Mahaffie said (p. 708; R. 323):

"With that portion of the report which requires a permanent readjustment of class rates I do not agree. As to what I consider its defects I am in accord, in the main, with COMMISSIONER PORTER'S comments in his dissent herein. In a country so vast as this with its widely varied resources and differing transportation needs it seems to me a mistake to try to compel general equality in rates except to the extent equality is justified by transportation conditions. I think the effort to do so must necessarily fail. But I am afraid the process of finding out whether it can be done will be painful and costly."

Commissioner Patterson agreed "with much of what COMMISSIONER PORTER has to say in criticism of the majority report." He expressed the view (pp. 708-709; R. 323-324):

"that there should be an '*ad interim* class rate revision' in connection with which an increase in official territory class rates, as contemplated by the majority report, should be tentatively approved, subject to protest and suspension, but that such increase

may not be required. I find no justification for the action of the majority in entering a minimum-rate order."

He said further (p. 709; R. 324):

"I do not subscribe to the 'Ultimate Findings' of the majority. In my opinion any attempt to prescribe the rates to apply in connection with a uniform classification which is not yet in existence is premature."

Thereafter, in July 1945, and within the period allowed therefor by the Commission's Rules of Procedure, petitions for reconsideration were filed with the Commission on behalf of appellants, of various chambers of commerce and commercial organizations, of various groups of shippers, and of various railroads. In some of these petitions it was alleged that greatly changed conditions, both as to transportation and as to industrial production, had been brought about by the war and thereafter by reconversion, and that because of these circumstances the evidence, relating as it did almost entirely to conditions in 1939 or the early war years, was stale and, apart from all other considerations, would not for this reason support an order prescribing rates for the future (R. 416, 417). It was alleged that the war conditions had prevented many interested parties from presenting evidence and that it would be unjust to subject them to changed rates unless and until the respondent railroads should establish and make effective the changed rates prescribed thereby on November 30, 1945 upon not less than thirty days' notice, instead of upon August 30, 1945 (R. 418, 419). By order, dated October 26, 1945, the Commission further amended its order of May 15, 1945 to require that the changed rates prescribed therein be made effective on January 1, 1946 upon not less than thirty days' notice (R. 431).

On or about November 1, 1945, the Commission issued its supplemental report, dated October 30, 1945 (R. 432), and its order pursuant thereto of the same date (R. 479). The Commission in this supplemental report found that certain changes should be made in its original report and order, but it denied the petitions for reconsideration filed on behalf of appellants and others, refused to grant reconsideration or further hearing for the receipt of evidence as to conditions at the present time, and affirmed its previous decision and interim order that as an interim adjustment the class rates within Official territory should be increased 10 per cent. Without any further evidence before it, it made certain additional findings of fact, some of which are more particularly referred to hereafter. Again Commissioners Porter and Barnard dissented (R. 478).

When the Commission refused to postpone its order, the railroads, solely under the compulsion thereof, were compelled to file tariff schedules making the rate changes required, but when an interlocutory injunction was granted staying the enforcement of the Commission's orders these tariff schedules were set aside.

3. The Decision of the Court Below

As promptly as possible after the Commission's last decision and order these suits were instituted. The statutory three-judge court (Judges Chase, Knox and Brennan) granted an interlocutory injunction staying the enforcement of the Commission's orders pending its decision upon the merits.

Following a hearing, at which, as has been said, the entire record before the Commission was offered in evidence and additional evidence was presented by the Western railroads, the court announced its final decision denying a permanent injunction. It is difficult to follow and summarize the reasoning of the court:

The court made no independent findings of its own but simply adopted the findings made by the Commission. The court said that there was ample evidence to sustain the Commission's finding that the class rates in the several territories are upon different levels, a fact which of course is not contested by anyone. It held that the Commission could require an increase in the class rates in Official territory without a primary finding supported by substantial evidence that the present rates are not compensatory. It made various statements, cited in appellants' assignment of errors, with regard to the Commission's findings which are not borne out by the Commission's report. It apparently rested its decision largely upon the conclusion that the amendment made to Section 3 of the Act by the Transportation Act, 1940 empowered the Commission to make the orders under attack.

Thereafter, however, after further hearing, the court certified to reasonable doubt as to the correctness of its decision and continued the interlocutory injunction pending the appeal to this Court.

4. The Historical Background of the Proceeding

Both the proceedings before the Commission and the legislative changes which have played an important part in its action and in the decision of the court below must be viewed in the perspective of their historical background if they are to be properly understood and judged.

It is a historical fact, amply documented by the testimony of witnesses before the Commission, that the Commission's orders were the culminating act in a chain of events which began years before with the decision of the Governors of several of the Southern States to inaugurate a campaign for the promotion of the industrial development of their States. A remarkably aggressive campaign of advertising was instituted by the Southern Governors

Conference, examples of which are to be found in the record here (Exhibits 160, R. 10293; 180, R. 10848), in which the advantages of the South for the location of manufacturing enterprises were stressed and the great successes of the Southern States in attracting new industries were extolled.

Ignoring the freight rate advantages which Southern communities and industries have had in the form of many substantially lower rates than were available in the North for the transportation of raw materials to manufacturing points and their numerous exception and commodity rates, the Southern Governors hit upon the fact that the class rates for transportation in the South and from the South to Official territory (which rates were generally not paid because lower commodity or exception rates were available) were higher than the class rates for transportation within Official territory for corresponding distances and that for the transportation of certain goods from the South to Northern markets the interterritorial rates were somewhat higher, distance considered, than the rates within the North. They apparently conceived the idea of a campaign for "uniformity" of freight rates—not uniformity of all rates but uniformity of rates where the published rates in the South were higher than those for transportation in the North. There was much in the press, in magazines, and in speeches regarding rate discrimination against the South. It was testified before the Commission here that "in the early part of 1937, the agitation started through the Southern Governors Conference for a revision in the rates on certain commodities" (R. 2429, 3837).

The first action in the way of rate litigation was the so-called *Southern Governors Case, State of Alabama* v. *New York Central R. Co.*, 235 I. C. C. 255, in which complaint was made to the Commission against the rates from Southern producing points to destinations in Official territory on a few specified commodities. In this case, following the

thesis of a pamphlet issued by the Tennessee Valley Authority and prepared by an economist who is now a member of the Commission and was one of those concurring in the majority report and the orders here under attack, it was alleged that the rates from the South were unlawful to the extent that they were on a higher level than the level of the rates on the same freight obtaining in the territory of destination.

The late Commissioner Eastman, one of the ablest and fairest men ever to sit upon the Commission, had this to say in his report in that case concerning the atmosphere in which the Commission was called upon to render its decision (p. 333):

> "The Commission is called upon to decide this case, on the record, after it has in effect been decided, in advance and without regard to the record, by many men in public life, of high and low degree, who have freely proclaimed their views on what they conceive to be the basic issues. Their thesis has been that the section of our country generally known as the South is our 'Economic Problem No. 1', because, among other things, it is low in industrial development, and that a major reason for this condition has been and is an unfair adjustment of freight rates which has favored the producers of the North and burdened those of the South. It has become a political issue. While, however, the South gave birth to the issue, public representatives of the West now cry out against like supposed oppression, and public representatives of the North or East, as it is variously called, have risen in defense of their section.
>
> "Under such conditions, it is not easy to decide the case without being influenced by emotional reactions, one way or the other, which should play no part in the decision."

Shortly after the decision in the *Southern Governors Case*, the Commission issued its orders of investigation in this proceeding. Although ostensibly a proceeding of in-

vestigation on the Commission's own motion, it was testified regarding its origin that there was "no doubt but what Governor Graves (of Alabama) beat the tom-toms" (R. 3836, 3887).

The able Assistant Attorney General, at the hearing before the three-judge court on the application for an interlocutory injunction, referred to the investigations as responsive

> "to a ground swell of agitation about it over a number of years" (Transcript, p. 72).

The campaign entered the halls of Congress and various bills were introduced, which by their terms would require the Commission to prescribe uniform class rates and ratings for the transportation of manufactured articles or would make it unlawful for the railroads to maintain different rates for transportation in different sections of the country. None of the bills of this character was enacted, but there finally emerged the so-called Ramspeck Resolution, which was adopted as Section 5(b) of the Transportation Act, 1940. It will be referred to more fully presently, but it is sufficient at this point to state that it authorized and directed the Commission to institute an investigation into the freight rates for transportation from one territory to another.

The Southern Governors' freight rate campaign was also reflected in many expressions on the floors of Congress, reported in the Congressional Record. Thus the Chairman of the Senate Committee on Interstate and Foreign Commerce congratulated the Senator from Alabama upon his influence in that there were two Commissioners from Alabama upon the Interstate Commerce Commission, one of them the author of the T.V.A. study on freight rates (Congressional Record, Vol. 84, p. 5889, Part 6, May 22, 1939) who joined in the Commission's decisions in the *Southern Governors* case and in this proceeding. The occa-

sion of the congratulations referred to confirmed the faith of a Southern Congressman, who on the floor of the House some time before had said (Congressional Record, p. 5535, Appendix, Vol. 86, Part 17, 76th Congress, Third Session):

> "During the past few years we have won notable victories for the removal of the interterritorial discriminations. When President Roosevelt became President the South had only one member of the eleven members of the Interstate Commerce Commission. President Roosevelt has given the South four members on the Commission and has publicly declared a deep interest in the removal of the discriminations. It was with sore regret that I witnessed the resignation of Mr. Marion Caskie from the Commission, but you may be assured that we, your Representatives in Washington, are insisting that the vacancy be filled by the appointment of a southern man who understands the interterritorial problem and who will be absolutely fair to the South. I have faith to believe that such a man will be appointed."

It was contended by counsel for the United States in the lower court that no point should be made of the agitation and the atmosphere thus created because it reflected the operation of the democratic process. It is not suggested here that if rate making by the legislative action of Congress is sought, a campaign of publicity may not be appropriate. We have, however, a system of regulation under which rates are to be changed, not by act of Congress pursuant to popular outcry from one group or another, but solely on the basis of findings by the Commission, based upon evidence after an impartial hearing. Rates are not unlawful in violation of the Act merely because an active section of the people claims that they should be changed or thinks that railroad tariffs are cumbersome or that a more consistent rate quoting method would be desirable.

In this connection, moreover, it should be noted that the loudness and persistence of the agitation regarding

freight rates made by the Southern Governors and other spokesmen should not be taken as proof of unanimous sentiment even in the South, or of general dissatisfaction with the existing rates. This is indicated by the fact that when the Commission instituted its investigation and held extended hearings, to which great publicity was given, only a paltry number of actual shippers or manufacturers in the South had sufficient interest in the matter to attend the hearings and present testimony. And as the Commission itself has found, and as will be shown later in this brief, it developed that in large part the rates which they complained of were not the class rates at all and that where complaint was made of the class rates they had not in any way operated to curtail the ability of the shippers to produce and ship their products into Northern markets (R. pp. 615-619, 670, 671, 673, 720, 721; R. 230-234, 285, 288, 335, 336). On the contrary, there was very vigorous testimony from representatives of manufacturing industries in the South and from the sort of industries which the Southern Governors desired to attract to their States in opposition to the plea for uniformity. This opposition was predicated largely upon the importance to them of the low rates on their inbound raw materials and of the fact that the railroads had provided reasonable rates for their outbound products (p. 615, R. 230).

We cite the agitation in the background of this proceeding because, as will be later pointed out, it may explain why, in the face of a complete absence of evidence, as we contend, which under previously established principles and interpretations of the Interstate Commerce Act would be required to sustain the Commission's determination and orders, the Commission has nevertheless been led to its decision that the law requires that class rates be found unlawful if not on a uniform level throughout the country.

Finally, it should be said that appellants regret and hope that the sectional aspects of this litigation may be ignored lest they tend to obscure the more fundamental and far-reaching features of the proceeding, which go to the integrity and administration of our regulatory system and therefore concern the country as a whole. Despite the fact that the Commission's orders would injure the appellant States by imposing a substantial increase in the costs of railroad transportation therein while the portions of the orders requiring reductions in the South and West would benefit but an insignificant fraction of traffic in those territories, much the most serious features of the case are the two basic conceptions upon which, apparently, the Commission has acted; namely, that the law requires uniformity of class rates, and that the Commission may require uniformity even at the expense of imposing additional freight charges on a large section of the country without findings or evidence of facts which would ordinarily be necessary to justify the exercise by the Commission of minimum rate power or sustain a determination that Sections 1 and 3 of the Act are violated.

5. The Principal Issues

Despite the great importance of the subject matter, the size of the record and the all too lengthy details which are necessary to a complete statement of the case and to its argument, the principal issues involved are few and may be stated briefly and simply.

1. May the Commission, as an exercise of authority conferred by the Interstate Commerce Act to prescribe minimum reasonable rates, order the railroads in one section of the country to increase their class rates charged by them for the transportation of an important part of their total freight, thereby imposing an added freight burden of many millions of dollars annually on shippers and receivers in that territory, for the purpose of bringing

about an approach to uniformity in the level of those class rates with the level of class rates in other territories;

(a) When there is no finding and no evidence to support a finding that the class rates so to be increased are not adequately compensatory for the service rendered, nor is there any finding or evidence that such class rates threaten a rate war or a destruction of railroad revenues, and when, on the contrary, the evidence shows and the Commission finds that the class rates to be increased are already highly profitable to the carriers for their services;

(b) When the class rates to be increased are actually charged on a large volume of freight while the class rates in other territories with which they would be equalized are charged upon a very small percentage of freight because the railroads in the other territories have provided lower exception or commodity rates, so that uniformity of class rates would not mean equalization of rates actually charged?

2. May the Commission determine that class rates result in undue prejudice and preference as between territories in violation of Section 3 (1) of the Act because they are on different levels in the different territories and thereupon order the lower class rates to be increased to bring about uniformity of levels;

(a) When there is no finding or evidence to support a finding that the corresponding class rates are actually charged and paid in the several territories and when, on the contrary, the findings and evidence indicate that in large part freight which is transported at the class rates to be increased in Official territory is charged at lower commodity or exception rates in the other territories;

(b) When there is no finding and no evidence to support a finding that the differences in the levels

of the class rates are the cause of any substantial injury to individual shippers or to territories as a whole and the findings and evidence are to the contrary, and

(c) When the class rates in each territory were prescribed by the Commission after hearings and in the light of the different conditions found by it to exist in the several territories and there is no finding nor evidence that such conditions have changed?

3. Did the amendment made to Section 3 (1) by the Transportation Act, 1940 and the so-called Ramspeck Resolution constitute a mandate to the Commission to prescribe uniform class rates in all territories and so change the law as to empower the Commission to do the foregoing things despite the absence of the findings and evidence described and previously held essential thereto?

4. As a result of such legislation, are class rates unlawful merely because on different levels in different territories and because there are not corresponding differences in the average costs of transporting all freight in the several territories?

5. Did the court below err in declining to take judicial notice that conditions affecting freight rates probably changed radically as the result of the war and then of reconversion, and in not setting aside the Commission's orders which were based on evidence relating largely to conditions in 1939 and the early war years pending further consideration by the Commission of such changed conditions?

6. Have the general increases in all rates, including the class rates, made by the carriers pursuant to a recent investigation, decision and order of the Commission, Ex Parte 162, *Increased Railway Rates, Fares and Charges*,

1946, in the light of increased costs and changed conditions since January 1, 1946, which increases have completely altered the rate structure and eliminated the rates to which the orders here in suit were addressed, rendered such orders obsolete so that they should now be annulled?

Specification of assigned errors intended to be urged

Appellants intend to urge all of the errors assigned in their assignment of errors (R. 1455-1465).

Summary of Argument

Preliminary: The Commission is a regulatory agency of broad powers, but the importance of the matters with which it deals and the scope of its functions require that its action be scrutinized lest it transcend the limits of its authority. The Commission is not the manager of the railroads. *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 522; *Interstate Commerce Commission* v. *Columbus & Greenville Ry.*, 319 U. S. 551, 560. A zone of reasonableness exists between maximum and minimum rates and within this zone carriers are ordinarily free to adjust their charges. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499. Since it is the function of the Commission only to enforce the Interstate Commerce Act, it may not require rates to be changed because it differs with the business policy or economic theories of railroad management, nor for the purpose of bringing about a shift in the location of industry or of equalizing disadvantages of industries due to location. The Commission may require freight rates to be changed only upon a finding that they violate one of the provisions of the Act. And it must make precise findings as to why and the respects in which the existing rates violate the statute. Its orders and ultimate findings of violations must be based upon essential preliminary findings of fact supported by evidence of record. In the absence of such

preliminary findings, the courts will not examine the evidence in order to determine whether such findings could have been made, nor may essential preliminary findings be supplied by implication. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 504, 505; *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. The Court will however, examine the evidence to determine whether the preliminary findings of fact which are made are supported by substantial evidence. *Int. Com. Com'n.* v. *Louisville & Nash. R. R.*, 227 U. S. 88, 91; *Florida* v. *United States*, 282 U. S. 194. Furthermore, since the Commission is authorized to change rates only if it finds after hearing that existing rates are unlawful, its findings and orders must be based upon evidence presented to it at such hearings and not upon its own independently held ideas as to what is economically desirable. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 444; *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 472.

1. The orders of the Commission requiring a 10 per cent increase in class rates for transportation within Official territory, which would impose an added freight cost of many millions of dollars annually upon shippers and receivers of freight in the appellant States, are invalid as an attempted exercise by the Commission of authority to prescribe minimum reasonable rates and its ultimate determination that the existing class rates which were previously prescribed by the Commission as maximum reasonable rates had become less than minimum reasonable rates in violation of Section 1, paragraphs (4) and (5) of the Interstate Commerce Act was arbitrary and invalid because not supported by essential preliminary findings and because without support of substantial evidence.

The Commission may determine that rates are less than minimum reasonable rates and order them increased only if it makes preliminary findings supported by evidence, that the rates are non-compensatory or cast a burden on other traffic, or threaten ruinous rate wars and disruption of a lawful and reasonable rate structure, or otherwise jeopardize the carriers' financial ability to provide the public with adequate economical and efficient transportation services. *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 633; *Anchor Coal Co.* v. *United States*; 25 F. (2d) 462, 471, 472; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 506.

There is a complete absence here of any such findings or of evidence that the class rates in Official territory or the differences in levels of the class rates produce such effects or that the class rates for transportation between points in Official territory are not fully compensatory.

The Commission's finding that comparisons of rates of return indicate that the revenue needs of the carriers in Official territory with respect to their class rate traffic are greater than is the case as to the carriers in other territories, is not a finding sufficient to sustain a minimum rate order requiring an increase in rates, since it does not appear that the relative rates of return are due to the class rates or that an increase in the class rates would raise the rate of return of the Official territory railroads, or that the rate of return of those railroads is inadequate.

On the contrary, the Commission's findings and the evidence demonstrate that the class rates which the Commission ordered increased 10 per cent were already highly profitable and there is, therefore, no justification for requiring Official territory shippers to pay still higher rates. In such circumstances this Court has repeatedly held invalid orders of the Commission requiring increases in rates for the purported purpose of increasing revenues. *Florida* v. *United States*, 282 U. S. 194, *Florida* v. *United*

States, 292 U. S. 1, 8; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 507, 508; *North Carolina* v. *United States*, 325 U. S. 507, 516.

2. To the extent that the orders purport to proceed on the theory that the differences in the levels of the class rates create undue prejudice and preference in violation of Section 3(1) of the Interstate Commerce Act, the orders are arbitrary and invalid because not supported by essential preliminary findings and because without support of substantial evidence. The court below erred in not so deciding. No finding of undue prejudice and preference may be made because of differences in the levels of the class rates unless it appears that they are the rates actually charged. Discrimination is something more than a difference in rates. *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627. There must also be a competitive relationship between the party prejudiced and the party preferred, and a finding that the difference in rates is the cause of substantial injury to the former or benefit to the latter.

Further, before undue prejudice and preference may be found it must be established that the differences in rates to competing shippers or localities are not justified by differences in transportation conditions. Where the disparity in rates is due to differences in transportation conditions, the differences may not be held to cause discrimination. To require the elimination of differences in rates under such circumstances for the benefit of the supposed prejudiced party would be to equalize the fortunes of shippers. This neither the carriers nor the Commission may do. *United States* v. *Illinois Cent. R. Co.*, 263 U. S. 515, 524; *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 473. The prohibition contained in Section 3(1) against discrimination is directed to carriers subject to the Act and there can be no finding of undue prejudice and pref-

erence unless there is a preliminary finding that the same carrier or carriers are responsible for or control both the preferential and prejudicial rates. *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 650; *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247.

There is a complete absence of such essential preliminary findings here and of evidence to support them. There is no finding nor evidence to support a finding that the commodities moving on class rates in Official territory also move on class rates from the South and West to Official territory. On the contrary, the Commission's findings and the evidence indicate that on the traffic moving from the South and West to Official territory the railroads have generally provided lower exception and commodity rates so that the class rates are merely "paper rates" which cannot be the cause of undue prejudice and preference since they are not charged. There is also no finding that the differences in the levels of the class rates have caused substantial injury to shippers in the South and West or have curtailed or restricted the industrialization of the South. The Commission's summary of the economic evidence in this regard, contained at pages 619 to 624 of its report, and also set forth at pages 91 to 94 of this brief, negative any such suggestion. The findings and evidence show that the South has prospered and has had a greater industrial growth than the rest of the country. The Commission made an express finding that no specific instance was proved where an industry was not established in the South because of the class rate level (R. 237).

There is no finding nor evidence that the class rates within Official territory and those applicable to transportation from the South and West into Official territory are controlled by similar circumstances and conditions and the findings and evidence are to the contrary.

3. The court below and the Commission erred in concluding that the amendment to Section 3(1) of the Interstate Commerce Act by the Transportation Act, 1940, coupled with Section 5(b) to the latter Act so changed the law as to require and sustain the Commission's decision and orders. The Commission was influenced by the agitation for rate uniformity and not by the language of the provisions. It made the same sort of an error as it did in construing the so-called Hoch-Smith Joint Resolution and in making certain orders thereunder which were held invalid by this Court in *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, and *Atchison, Topeka and Santa Fe R. Co.* v. *United States*, 284 U. S. 248.

4. Factual grounds upon which the Commission rested its determination that the class rates are unlawful because not on a uniform level are not supported by preliminary findings of fact or by the evidence and do not sustain its conclusion.

The cost computations upon which the Commission relied as indicating the relative costs of transporting freight in the several territories are estimated of average costs of handling all kind of freight and do not purport to show the costs of handling class rate traffic in the respective territories. These cost studies have numerous other major defects. The Commission's conclusions are directly in conflict with the conclusions reached by it in *Western Trunk Line Class Rates*, 164 I. C. C. 1, 188, and *Commonwealth of Kentucky* v. *Ahnapee and W. Ry. Co.*, 213 I. C. C. 297, 308, in which it expressly held that the average cost of handling traffic could not be considered indicative of the cost of handling class rate traffic. See also *Nor. Pac. R.* v. *Dept. of Public Works*, 268 U. S. 39, 43, 44; *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 380 and *Calif. Growers and Shippers Protective League* v. *So. P. Co.*, 129 I. C. C. 25, 52.

Neither does the fact that there are differences in the kinds of freight transported within the several territories support the Commission's orders. On the contrary, the evidence as to so-called "consists" of traffic in the several territories precludes an ultimate finding that the class rates are unlawful because not uniform. In Official territory the carriers have followed the policy of maintaining rates on manufactured and other products of high value which are lower than the rates maintained in the South and West and have maintained relatively high rates on raw and low grade materials, whereas the railroads in in the South and West have followed a policy of maintaining low rates on this character of freight.

The Commission's orders are not supported by the references in its report to the small proportions of freight moving at class rates in the South and West and between those territories and Official territory. The fact that only a small volume of freight moves on class rates in territories other than Official territory, indicates only that the carriers in those territories have established lower exception and commodity rates on which the traffic moves.

The fact that the average rate of return of the railroads in Official territory has been slightly less in recent years than the corresponding average figures for the railroads of the South and West does not support the ultimate finding of undue prejudice and preference in violation of Section 3(1) or the finding that the present class rates in Official territory are less than minimum reasonable rates in violation of Section 1(4) and (5) (a) and does not justify the orders requiring an increase in the latter rates. There is no finding and no evidence that would support a finding that the differences in the rates of return of the carriers in the several territories are due to the class rates. On the contrary the evidence shows that the class rates in Official territory are the most profitable.

5. The orders in requiring a 10 per cent increase in the class rates for transportation in Official territory, in view

of the compensatory character of the existing rates, violate Section 15a(2) of the Interstate Commerce Act. That section requires that rates shall be established in consideration of the lowest cost consistent with the furnishing of adequate and efficient transportation services. Since the existing class rates are profitable the increase ordered therein violates this section.

6. The orders are beyond the authority of the Commission, arbitrary and discriminatory in that they would require shippers and receivers in Official territory to pay increased freight rates for the benefit of the railroads in the South. The lower Court erred in not so deciding.

7. The Commission's orders represent an attempt to alter economic and industrial conditions and for that reason are beyond the authority of the Commission.

8. To the extent that the orders rest on a finding of undue preference and prejudice in violation of Section 3(1) they are invalid because they do not leave the carriers an alternative as to the method of removing the rate differences.

9. The court below erred in failing to hold that the evidence does not support the orders which are to take effect in the postwar period, and that the Commission erred in refusing to reopen the proceeding to take evidence as to the present and probable future conditions.

10. The recent decision and order of the Commission in Ex Parte 162, *Increased Railway Rates, Fares and Charges, 1946*, and the general increases in their freight rates made by the railroads pursuant thereto, have completely altered the rate situation to which the Commission's orders in the *Class Rate Case* were directed and have made those orders obsolete and impossible of enforcement according to their terms so that they should be set aside and permanently enjoined.

ARGUMENT

Introduction

A. Some general comments upon the nature and scope of, and the limitations upon, the authority and functions of the Commission

The Commission is a regulatory agency of broad powers. It must often act upon complicated and detailed statistics and evidence of many technical matters. Hence, its decisions on the evidence should not be lightly disturbed. Its functions extend to matters of vital import to the economy of the country. The very importance of the matters with which it deals and the broad scope of its authority require, however, that its action be closely scrutinized lest it transcend the bounds which Congress has placed upon its authority.

Of these limits there are several which are pertinent here, which have been clearly defined by the decisions of this Court and of the Interstate Commerce Commission itself. Thus it is well settled that the Commission is not the manager of the railroads, and that matters of business or pricing policy are not for it to determine, provided the rates actually charged are just, reasonable and nondiscriminatory measured by recognized standards.

In *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515 (1923), this Court said (p. 522):

> "A carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise. *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 118-119; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92."

Again, in *United States* v. *Chicago, M. St. P & P. R. Co.*, 294 U. S. 499 (1934), it was reaffirmed (p. 506) that:

> "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself. *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 636; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 522."

In *I. C. C.* v. *Columbus & Greenville Ry.*, 319 U. S. 551 (1942), Mr. Justice Douglas, in a concurring opinion, stated (p. 560):

> "The rule governing the right of carriers to initiate rates has not changed. *United States* v. *Chicago, M. & St. P. & P. R. Co.*, 294 U. S. 499, 506."

Certainly if there is any matter which is one of business policy it is the nomenclature to be applied to rates and the kinds or categories of rates to be published and charged. Because rates are called "class rates" does not give the Commission any special authority to deal with them. Nor is it a function of the Commission to take action designed to induce the charging of rates called "class rates" rather than of commodity or exception rates. This point is of importance here because of the emphasis placed by the Commission in its report (R. 698, 699) on the fact that in the South and West the rates actually charged on all but an infinitesimal portion of the freight are commodity or exception rates. Indeed the Commission seems influenced to its decision by a view that it will be desirable that more freight should be charged class rather than commodity or exception rates and that the class rates are unlawful because they are not more generally charged in the South and West.

But it is clear that rates can be unlawful under the Act only if they *are* charged, or are the rates to be charged if any freight should move. Mere "paper rates" are not unlawful, because the Act provides that it is the "charges made for any service rendered or to be rendered" which must be just and reasonable (Section 1(5)(a)).

Furthermore, since it is the function of the Commission only to enforce the provisions of the Interstate Commerce Act, it may not require rates to be changed because it differs with the business policy or economic theories of railroad management. It may not require rates to be changed for the purpose of bringing about a shift in the location of industry or of equalizing disadvantages of location in order to subsidize the establishment or development of industry at one place rather than another in accordance with its economic theories, however valid they may be. The Commission may require freight rates to be changed only upon a finding that the existing freight rates established and charged by the railroads violate one of the provisions of the Interstate Commerce Act, and it must make precise findings as to why and the respects in which the existing rates violate the statute.

In *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499 (1934), it was said (pp. 504-505):

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida* v. *United States, supra.*"

Again in *Atchison Ry.* v. *United States*, 295 U. S. 193 (1934), it was said (pp. 201-202):

> "Its (the Commission's) report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be

given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida* v. *United States*, 282 U. S. 194, 215. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433. See *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86. *Interstate Commerce Comm'n.* v. *Chicago, B. & Q. R. Co.*, 186 U. S. 320, 341."

In *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475 (1941), the Court, after noting that the precise grounds of the Commission's determination were not clear, said (pp. 488-489):

"* * * as in *Florida* v. *United States*, 282 U. S. 194, 215, the defect is not merely one of the absence of a 'suitable complete statement' of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the Commission's order.' And see *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-511. * ** An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain."

Moreover, mere findings of the Commission that existing freight rates violate the statute will not sustain an order requiring the rates to be changed unless the findings are themselves supported by substantial evidence, and it is the province of the Court to examine the record and ascertain whether such is the fact.

The Supreme Court in *Int. Com. Comm.* v. *Louis & Nash. R. R.*, 227 U. S. 88 (1912), held (p. 91):

"A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or

tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'."

In *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274 (1923), the Court said:

"* * * a finding without evidence is beyond the Commission's power."

In *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462 (D. C., S. D. West Virginia 1928), it was stated (p. 464):

"To understand, however, exactly what the power is which the Commission has assumed to exercise, it is necessary that we go behind its merely formal conclusions that rates are reasonable or unreasonable, and ascertain exactly what it is that it has done, and upon what facts and upon the application of what principles it has arrived at its conclusions. This is our duty to do. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; *U. S.* v. *N. Y. Central Railroad*, 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470."

In *Colorado Interstate Gas Co.* v. *Federal Power Com'n*, 142 F. (2d) 943 (C. C. A., Tenth Circuit, 1944) it was held (p. 954):

"* * * the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact. In the absence of substantial evidence to show

that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431."

In *Florida* v. *United States*, 282 U. S. 194 (1930) this Court stated (p. 215):

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States, ante*, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and *the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.*" (Italics added.)

Finally, since the Commission is authorized to change rates only if it finds existing rates unlawful and only when it makes such a finding after hearing, it necessarily follows that its determination must be based upon the evidence presented to it at the hearing and not upon its own independently held economic ideas as to what is sound or desirable. *Southern Pac. Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 444; *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 472.

The application here of these basic principles and of the limitations which they impose upon the Commission's functions and action will become apparent with the more detailed analysis of the facts and the issues which will follow.

B. Plan of this argument in the light of the nature of the issues.

The appellant States are naturally primarily concerned with so much of the Commission's order as would require a 10 per cent increase in the class rates of the railroads for transportation within Official territory in which appellant States are comprised. This is so for several reasons.

In the first place, the evidence before the Commission showed that there is a very substantial volume of the total transportation within Official territory upon which the carriers charge class rates which would be increased under the Commission's orders. The Commission found in accordance with its Exhibit No. 228 (R. 11834), which was based on a study of all carload traffic moving on September 23, 1942, that 5.8 percent of all carload traffic within Official territory was charged the class rates. It is this substantial portion of the very large volume of carload traffic within Official territory upon which shippers and receivers would be required by the Commission's order to pay freight charges 10 percent higher than those in effect at the time the order was made. It is estimated that these increased charges would certainly amount to at least $15,000,000 per annum (R. 574).

In the second place, a 10 percent reduction in the class rates for transportation within Southern and Western territories and from those territories to Official territory can be of little benefit to those territories as compared with the great burden which the portion of the orders requiring a 10 percent increase in the class rates within Official territory would place upon shippers and receivers in Official territory. This is because of the further fact disclosed by Exhibit 228, previously referred to, that the railroads have provided commodity or exception rates for 98.2 percent of the carload traffic transported within Southern territory and 99.4 percent of the total carload traffic transported within Western Trunk Line territory, so that it is only an in-

finitesimal portion upon which the railroads demand class rates which would be reduced under the Commission's orders.

It follows that from the standpoint of real interest to the parties, other than the Western railroads, the principal issue in this case is whether that portion of the Commission's orders requiring a 10 percent increase in the class rates for transportation between points in Official territory is valid.

The answer to this question requires, first, examination of the law as to what must be found and proved to sustain an ultimate determination that rates are unreasonably low in violation of Section 1 of the Interstate Commerce Act or that they result in undue and unreasonable preference in violation of Section 3. It next requires examination of the findings and the evidence in the present case to ascertain whether the Commission has found and whether the record justifies such essential findings of facts. Appellants will direct the two first points of their argument to the discussion of these underlying questions.

If, as appellants contend, neither the findings of the Commission nor the evidence satisfy the requirements previously held necessary to sustain an ultimate determination that rates are unreasonably low in violation of Section 1 or that they produce undue preference and prejudice in violation of Section 3, it will remain to consider in the third point whether the amendments of 1940, as the Commission appears to have held, changed the law and the requirements for determinations of violations of Sections 1 and 3, or whether for some other reasons, rates prescribed by the Commission and long in effect are now unlawful because not on a uniform level.

Then examination will be made as to whether the findings of the Commission and the factual considerations relied upon are sufficient to sustain the orders requiring an in-

crease in class rates within Official territory under the law as so changed.

Finally, it will be necessary to consider whether, since the Commission's findings and orders were predicated in very large part upon evidence as to conditions in 1939 and the early war years, the Court is not called upon to take notice and hold that conditions have so changed since that time as to render the Commission's orders now anachronistic and unenforceable.

C. Some important factual considerations

As a background for the consideration of the questions just outlined, there are certain important facts to be considered which have a direct bearing upon the determination of the issues which are here to be decided. Some of these facts will have to be restated later in the argument herein but since they have such general bearing upon all of the issues to be decided, a brief reference to them at this point appears appropriate.

(1) As previously stated, the Commission's order would require a 10 percent increase in the freight rates actually charged upon a very substantial portion of the large volume of freight transported between points within Official territory. It is estimated that this phase of the orders would impose an added cost for transportation and therefore of doing business in the appellant States amounting to at least $15,000,000 per year (R. 574).

(2) Although the professed purpose of the Commission is to bring about uniformity of freight charges and remove what it believes to be undue prejudice and preference as between the several rate territories, nevertheless in contrast with the very substantial proportion of the total traffic upon which class rates are actually charged in Official territory, which rates would be increased 10 percent by the Commission's orders, there is only a negligible amount of freight upon which the class rates are charged for transpor-

tation in Southern and Western territories, because the railroads have provided commodity or exception rates for transportation within those territories which, being lower, have superseded the class rates (R. 179, p. 564).

(3) No shipper or receiver in any territory claimed that the class rates for transportation between points in Official territory were too low. Instead, the Southern and Western spokesmen generally sought uniformity on the Official territory level.

(4) Class rates for transportation within Official territory which the Commission now finds to be less than minimum reasonable rates were prescribed by the Commission itself not long ago as maximum reasonable rates. *Eastern Class Rate Investigation*, 164 I. C. C. 314 (1930), 171 I. C. C. 481, 177 I. C. C. 156, 203 I. C. C. 357 (1934). The Commission's orders, therefore, would assume that the class rates have traversed the "zone of reasonableness" from the maximum level for which they were prescribed by the Commission in the *Eastern Class Rate Investigation* to 10 percent less than the minimum reasonable level at the present time. However, the Commission has made no findings as to any facts nor is there evidence in the record to support findings as to changes in transportation conditions since these rates were so prescribed which would now render them less than minimum reasonable rates. The only change is the Commission's adoption of a new policy* that class rates should be uniform throughout the country and should not be made in the light of the conditions, the traffic and the rate structures of each territory.

(5) As shown by the statements from its reports quoted earlier herein, the Commission itself has recognized, in prescribing the class rates which its orders herein would

---

*cf. *United States v. Seatrain Lines, Inc.*, decided January 7, 1947.

change, that it did so in contemplation of the very different factors influencing the levels of the different sorts of freight rates in the several rate territories.

Thus the Commission's report in the *Eastern Class-Rate Investigation*, 164 I. C. C. 314, sets forth the considerations which have produced the class rates within Official territory. An examination of this report will indicate that the rates were influenced by such factors as the competition of the Erie and New York State barge canals; the large volume of passenger traffic of the principal railroads; the large volume of freight traffic and the important proportions thereof, consisting of manufactured articles and of products of mines; the harmonizing of the rates prescribed with the rates previously in existence; the preservation of the revenues of the railroads; the nature of the rate structure in the territory, including the relatively high commodity rates on heavy low-grade articles, and the very large proportion of freight traffic moving at class rates. At page 391 of its report in the *Eastern Class-Rate* case, the Commission said:

> "Class rates in official territory differ materially from those in other sections of the country. They are much lower in level, with the exception of certain rates in western trunk-line territory which approach them in level. They also apply, generally speaking, to a much wider range of traffic. *In the other territories class rates,* at least in the past, *appear to have been of particular interest to jobbers, and the traffic which they move seems to have been, and perhaps still is, predominantly less than carload. For carload traffic of any important volume commodity rates have generally been provided. This is not the situation in official territory, where a great deal of very important carload traffic moves on class rates.* Of the traffic embraced by the revenue test about 68 per cent was carload. Among the commodities which generally move in carloads on class rates in official territory but are given commodity rates in other territories are fruits and vegetables (including apples, cabbage, and pota-

toes), dairy products, vegetable oils, furniture, wrapping paper, soap, sash, doors, and blinds.

"A corollary of this situation is that, *as compared with the class rates, the commodity rates on heavy, low-grade articles in official territory are often relatively high and in the other territories relatively low.* While it is difficult to determine the fact with exactness, it is quite clear from general knowledge, and also from evidence here of record, that *the spread between the class rates in official territory and those in effect in the South and West is not an accurate index of the differences in general average rate levels,* the latter differences being relatively considerably less." (Italics added.)

With regard to the interterritorial class rates generally, the Commission said:

"Interterritorial rates usually represent a blend of, or lamination derived from, the rate levels within the territories or zones concerned" (p. 476).

(6) Of equal importance, especially in view of the role which its new policy of so-called uniformity apparently has played in the Commission's determination and orders herein, is the fact that uniformity of class rates is by no means the equivalent of uniformity of transportation rates and charges.

It is not to be ignored, especially since it played an important part in the legislative background of the present litigation, that there has been a widespread campaign to create the impression in the minds of the public that the South has been subjected to much higher freight rates than are charged to shippers and industry in the North and that thereby the South has been kept in a state of "economic bondage" to the North. The evidence here and the Commission's findings make it clear that such an impression is erroneous when freight rates as a whole are considered.

Thus the Commission finds that the Southern level of all freight revenue is only 3.9 percent above that for Official territory (p. 606, R. 221).

Again, the Commission at pages 666 through 669 of its report in this proceeding (R. 281-284) cites examples which are "illustrative" of the situation that in some instances "commodity rates within the southwest or from or to the southwest are lower than on like traffic for equal distances within official territory." Similarly, on page 593 of the report (R. 208) the Commission finds that "in many instances, commodity rates in the south are lower than commodity rates on like traffic in official territory." There follow seven pages of examples of commodity rates, to a large extent on raw materials or low-grade freight, which were either voluntarily established by the railroads or prescribed by the Commission itself which are on a lower level for transportation within the South than the rates for the transportation of the same commodities within Official territory. This is so as to logs (R. 211), lumber (R. 212), pig iron (R. 212), sand, gravel, crushed stone, and slag (R. 213), as well as other commodities.

It was testified by Witness Bell, a former traffic official of the Southern Railway, that these low rates for the transportation of raw materials in the South had been a result of the rate-making policy of the Southern railroads and orders of the Southern State authorities to induce the use of raw materials within the South (R. 3626-3630).

As the Commission said in the *Eastern Class-Rate Case*, page 391, a corollary of the differences in the class rate levels "is that, as compared with the class rates, the commodity rates on heavy, low-grade articles in official territory are often relatively high and in the other territories relatively low * * *. The spread between the class rates in official territory and those in effect in the south and west is not an accurate index of the differences in the general average rate levels * * *."

(7) In addition to the foregoing consideration is the further fact that even freight which moves at class rates in both Official territory and the South often enjoys a lower classification rating in the South so that despite the fact that the first class rates for transportation within the South are higher than the first class rates for transportation for similar distances in Official territory, the class rates actually charged upon the same freight are frequently lower in the South than in Official territory. At page 567 of its report (R. 182) the Commission found that "in making any comparisons of the levels of the class rates within the respective territories or zones, we are confronted with the fact that differences in the applicable classifications affect the levels of the rates as much as or more, in some instances, than the differences in the levels of the class rate scales."

(8) Finally, as a background for the consideration of the validity of the orders requiring an increase in the class rates in Official territory, it is important to inquire what must be the real reason why the Commission, having determined that the class rates should be brought to approximate uniformity or to a closer proximation to uniformity, decided that this should be achieved by an increase in the class rates within Official territory as well as by a reduction in class rates for transportation in the South and West and from those territories to Official territory.

The only expression of any reason to be found in the Commission's report is its statement on page 705 (R. 320) that its finding that the present class rates in Official territory should be increased 10 percent "is based in part upon a consideration of the returns from operation of the various respondents in the several territories as reported to us, which we have considered pursuant to stipulations of record. From those returns and the whole record we find and determine that the revenue needs of the carriers in Official territory with respect to their class rate traffic are

greater than is the case as to the class rate traffic of the carriers in the other territories described." The soundness of this statement and its validity as a basis for the Commission's ultimate conclusion and orders will be discussed more fully presently. At this point, however, it is sufficient to suggest simply that it hardly affords a substantial basis for a minimum rate order requiring an increase in upwards of $15,000,000 annually in the freight charges paid by shippers and receivers in Official territory. It is true that the figures of average rate of return upon property investment of the railroads in Official territory was somewhat lower than that for the railroads in other territories, but the statistics also show that this was the situation at the time the class rates were prescribed as maximum reasonable rates. Moreover, there was no finding and no evidence that the difference in rates of return is due to the difference in class rates or that an increase in class rates would increase the rate of return of the Official territory lines relative to that of the railroads in the South or in the West. It is apparent, therefore, that this statement is designed to conceal rather than to present the real reason for the Commission's action.

The real reason is clearly apparent in the evidence (Ex. 16, R. 6186; Ex. 195, R. 11271, 11272) and the Commission's reference thereto in its report (pp. 607-608; R. 222, 223) that to accomplish uniformity in class rates without increasing the rates within Official territory, namely, by reducing the rates in the South to the Official territory level, would involve a revenue loss to the Southern railroads of $23,499,831 per year based upon traffic handled in 1939 (R. 11271, 11272). It is obvious that the Southern railroads could not afford such a revenue reduction.

It follows, therefore, that the Commission's orders requiring a 10 per cent increase in class rates within Official territory would require shippers and receivers in that territory to pay increased freight charges not because their present rates afford inadequate compensation to the Official

territory railroads for the transportation of class rate freight, but in order to protect the revenues of the railroads in the South transporting freight for others. As will be argued presently, it is submitted that a minimum rate order requiring an increase in freight rates with this purpose or result is plainly beyond the power of the Commission.

With this preliminary survey of a few basic features of the rate situation and the action of the Commission, we turn to an examination of the law and the facts to ascertain whether the orders requiring a 10 per cent increase in class rates within Official territory can be sustained as a valid exercise of the Commission's rate power.

POINT I

The orders of the Commission requiring a 10 per cent increase in class rates for transportation within official territory are invalid as an attempted exercise by the Commission of authority to prescribe minimum reasonable rates, and its ultimate determination that the then existing class rates previously prescribed by the Commission as maximum reasonable rates were less than minimum reasonable rates in violation of Section 1, paragraphs (4) and (5) (a) of the Interstate Commerce Act was arbitrary and invalid because not supported by essential preliminary findings and because without support of substantial evidence.

A. The Law

The decisions of the courts and of the Commission itself, since Congress gave the Commission authority under certain circumstances to prescribe minimum rates and to order existing rates to be increased, clearly lay down the conditions which must exist to support a determination that rates violate Section 1 (4) and (5) by being too low, and the findings of facts which are essential to the issuance by the

Commission of a minimum rate order requiring that rates be increased.

Although the Interstate Commerce Act was first enacted in 1887, Congress did not confer upon the Commission the power to prescribe the minimum rates to be charged by carriers or to require them to increase their charges to the shipping public until 1920. The discussions of the subject leave no doubt that the power to set minimum limits to the freight rates to be paid by shippers was regarded as such a drastic power, whose exercise might so seriously affect the economic life of the country and the welfare of its citizens and communities, that there was hesitancy to confer such authority upon an administrative government agency. Finally in 1920 the law was amended to confer upon the Commission the power to prescribe minimum as well as maximum rates. Then for the first time could the Commission find a rate to be unreasonable in violation of Section 1(4) and (5)(a) because too low. However, it has still been consistently recognized that so far reaching may be this power that it should be exercised sparingly and with extreme caution and that a rate should be condemned under Section 1 as too low and a higher rate prescribed only on the basis of convincing proof that such action is necessary to prevent most serious consequences, partaking of the nature of an emergency, jeopardizing the transportation system or threatening imposition of a financial burden upon other traffic than that directly affected.

This is made clear by the expressions of the courts outlining the considerations which led to the amendment of the Act to give the Commission authority to order rates increased and stressing the changed objective of the legislation from the protection of shippers against exorbitant charges to the preservation of the financial capacity of the carriers to provide service. *Jefferson Island Salt Mining Co.* v. *United States*, 6 F. (2d) 315; *Scandrett* v. *United States*, 32 Fed. Supp. 995, affd. 312 U.S. 661; *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462.

Consistently with this altered objective of the Act, the decisions of this Court and of the Commission have clearly indicated that the minimum rate power should be exercised only when the facts found indicate a threat to this objective.

Thus in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627 (1933), the Court said (p. 633):

> "The evidence failed to show that the rates of the Texas & Pacific and the L. R. & N. on export and import shipments to and from New Orleans were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic. There was therefore no basis for an order fixing minimum reasonable rates under § 15(1) of the Act."

In a recent report of the Commission, *New Automobiles in Interstate Commerce*, 259 I. C. C. 475, the Commission reviewed quite fully the subject of the minimum rate power conferred upon it by the Transportation Act, 1920 and the circumstances under which that power may be exercised. It said, in part (pp. 534-535):

> "The power to prescribe reasonable minimum rates was first conferred upon us in the Transportation Act of 1920, mainly to prevent destructive competition and enable us to carry out the mandate in section 15 (a) of the same act, so that the carriers might 'earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.' In *Salt Cases of 1923*, 92 I. C. C. 388, we said, at page 410:
>
> "If the minimum rate-making power were intended by Congress to be used only in cases where the rate assailed had been proven with arithmetical exactitude to be less than the cost of service, the grant of that power would be ineffectual, because such a test of exact cost of service is impracticable of application to specific rates on a single commodity, and this has been recognized by the Supreme Court of the United States.

"The act prescribes no different tests or standards for the determination of just and reasonable minimum rates than for just and reasonable maximum rates. And there is nothing in the act which either directs or implies that we should use tests of different general character in the determination of reasonable minimum rates than those which we have consistently and uniformly applied for many years, with the tacit consent and sanction of the Congress and the express approval of the Courts, in fixing maximum reasonable rates.

"Our order in that proceeding was sustained in *Jefferson Island Salt Mining Co.* v. *United States*, 6 Fed. (2d) 315.

"In *Lake Cargo Coal*, 139 I. C. C. 367, proposed reduced rates that would have disturbed the rate adjustment were found not justified. We discussed our minimum-rate power and referred to court decisions holding that authority to exercise such power was not confined to situations where the rates were below a compensatory level. Although our order therein was set aside, *Anchor Coal Co.* v. *United States*, 25 Fed. (2d) 462, the court upheld our right to prescribe minimum rates 'to prevent ruinous rate wars and to guarantee reasonable earnings, not only to the carriers affected, but also to competing carriers, who may labor under higher costs of doing business.' The Supreme Court reversed the lower court, on other grounds, but what was said by the lower court later came to be regarded as settled law.

"The minimum-rate power has always been exercised sparingly. See *Inland Empire Paper Co.* v. *Great Northern Ry Co. Co.*, 219 I. C. C. 501, 510. In *Petroleum and Petroleum Products, Calif. to Ariz.*, 241 I. C. C. 21, 41, we said:

"Our power to fix minimum rail rates is granted by section 15 (1) of the Interstate Commerce Act. By the terms of that section, its exercise is to be limited to instances where after full hearing we shall be of the opinion that a rate or charge is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of such act. This power has been used sparingly. Generally its application has been confined to instances in which we have found that a rate was so low as needlessly to sacrifice a carrier's revenue."

In no case will any suggestion be found that the Commission is authorized to condemn a rate as unreasonably

low in violation of Section 1 or to exercise its minimum rate power to require an increase in rates for the purpose of effecting or stimulating a change in the industrial or economic map of the country, for the purpose of equalizing business fortunes and conditions, or for the purpose of enforcing the ideas of the Commission as to what would be a more orderly and logical rate structure.

Examination of the Commission's reports here will show a complete absence of any findings of facts or conditions such as those described in the foregoing citations. And a review of the record will demonstrate that there is no evidence which would support such findings with regard to the class rates for transportation within Official territory.

B. There is no finding and no evidence to support a finding that the class rates for transportation between points in Official territory are* not fully compensatory. Indeed both the evidence and the Commission's findings require the conclusion that the class rates which the Commission ordered increased 10 per cent were already highly profitable.

The action of the Commission in adding, by its supplemental report, an additional finding that the inter-terri-

---

* It must be understood that in all of this discussion until the last point in this brief, the factual matters stated, although the present tense may be used, are as they are disclosed by the record and the Commission's findings in the *Class Rate Investigation*. Since the Commission's decision and orders therein, the railroads have sought and have been granted general increases in all of their freight rates on the ground that their added costs since January 1, 1946 have made the former rates inadequate, *Increased Railway Rates, Fares and Charges, 1946*. It will be urged in the last point that this drastic change in conditions and in the rate situation has rendered the orders involved in this action inoperative and so obsolete that they should be permanently set aside. But the purpose of this note is to make it clear that except in the last point appellants are here speaking in terms of the record and not of actual conditions at the present time.

torial class rates within Official and Illinois territories are less than just and reasonable rates and are and for the future will be unjust and unreasonable in violation of Section 1(4) and (5) (a) of the Act (R. 477) does not bolster the Commission's orders. It is the findings of underlying facts essential to support such an ultimate finding which are wholly lacking and these are not supplied by the supplemental report, nor could they be because there was no evidence to sustain them.

The Official territory railroads made no complaint and offered no proof that their class rates were too low. When, after the Commission's orders and its denial of further reconsideration, they filed tariff schedules to increase their rates, they did so not voluntarily but only under the compulsion of the orders, and as soon as the enforcement of those orders was enjoined they cancelled the tariffs. Certainly railroad management could be expected to be the first to seek adequate compensation for the service of their companies.

The record will be searched in vain for a suggestion by anyone that the class rates for the transportation of carload freight within Official territory were not fully and highly compensatory to the railroads in Official territory.

It was urged by certain trucking interests who sought to have the railroads increase their rates for freight in less-than-carload lots in order that they might advance their own charges, that the less-than-carload rates of the railroads were not fully compensatory. And there are some statements in the Commission's reports pointing in this direction. But the small volume of less-than-carload freight is of minor importance in comparison with the great tonnage of freight in carloads.

So far as the large volume of carload traffic is concerned, there is not a word in the Commission's reports which can be construed as a finding that the class rates

which the Commission ordered increased 10 per cent were not already fully and highly compensatory to the railroads for their services. Not only is there no finding but there is no evidence whatever that the existing class rates in Official territory are not fully compensatory. On the contrary, as Commissioner Porter says, "the cost study (made by the Commission's staff, upon which the majority so heavily relied) indicates that carload traffic in the East is being handled at a profit" (p. 719; R. 334).

The cost study referred to was a study, or rather a series of exhibits prepared by the Commission's staff for the purpose of arriving at a means of ascertaining the average expense to the railroads of transporting in each territory a given quantity of freight for a given distance and loaded in a particular type of railroad car. These so-called studies were prepared under the direction of Dr. Edwards of the Commission's staff and he testified regarding them at the hearings. His testimony will be referred to more particularly hereafter.

The virtues and vices of these cost computations as the basis of any conclusion concerning the need or justification for a uniform level of class rates throughout the country will be discussed in a later point. At the present time, however, accepting these cost studies at their face value, they indicate most emphatically that the class rates in effect for transportation of freight within Official territory at the time the Commission made its orders afforded more than reasonable compensation to the railroads for the transportation of such freight.

The majority find that from the standpoint of volume of freight the fifth class rating is the most important in Official territory. Elsewhere the Commission remarks that a 300-mile haul may be taken as fairly representative. A chart included in Dr. Edwards' Exhibit 13 shows that his computed cost of transporting a 20-ton load (which would certainly be a reasonable average loading for fifth

class freight) in a box car for a haul of 300 miles would be about 18 cents per 100 pounds, this being what Dr. Edwards refers to as "total distributed expense", which includes "a fair return" upon the carrier's property. As compared with this figure, the present fifth class rate for 300 miles is 34 cents per 100 pounds, or nearly twice the cost, including a fair return.

Certainly there can be no justification whatever for finding that a rate almost twice the cost, including a fair return, is unlawful in violation of Section 1 because it is less than a minimum reasonable rate. Nor can there be justification for prescribing as a minimum reasonable rate for such a haul a figure of 10 per cent in excess of the present highly profitable rate.

Again, Table 3 of Dr. Edwards' Exhibit 12, shows a figure of 16 cents per 100 pounds as the full distributed cost, including a four per cent return, of transporting 25 tons of freight in a box car 300 miles in Official territory, exclusive of New England and of the Pocahontas lines. Appendix P of the same exhibit shows that the lowest class rate (sixth class) under the Official territory scale for this distance is 27 cents. The fifth class rate is 34 cents and the first class rate is 96 cents, or six times the computed cost, including a fair return on investment. Such a rate simply cannot be less than a minimum reasonable rate permitted by Section 1(4) and (5)(a), or else the Act has a meaning contrary to all ordinary ideas of language. Even if only five tons are loaded in a car, Table 3 shows a computed cost of 48.4 cents per 100 pounds. There is little, if any, freight with such a light loading for which the class rate is less than third class. Appendix P shows that the third class rate for 300 miles is 67 cents.

In the case of the Pocahontas lines, which are in Official territory and would be required to increase their class

rates 10 per cent, the present class rates are even more profitable, judged by a comparison of the rates with Dr. Edwards' computations of average costs of transportation. Here the average cost of transporting 25 tons of freight in a box car 300 miles is only 10.8 cents as compared with a present sixth class rate of 26 cents, a fifth class rate of 34 cents and a fourth class rate of 48 cents. With only five tons of freight in a car the cost is shown as 36.3 cents compared with first, second and third class rates of 96, 82 and 67 cents, respectively.

Further proof that the class rates applicable to carload traffic are not only highly profitable but provide a greater margin of profit than any other rates is contained in statistics set forth in the Commission's reports.

It will be noted from the table on page 611 (R. 226) of the Commission's report that in the Eastern district "Group V: Manufactures and Miscellaneous", although constituting a lesser proportion of the total carload traffic transported in that territory than "Group III: Products of Mines", produced 41.41 per cent of the total freight revenues in the Eastern district, which is greater than the amount of revenue produced by any other commodity group. It is the commodities included in Group V that constitute the great prepondence of the carload traffic moving on class rates in the East. In this connection a further table appearing on page 612 of the Commission's report is of interest. This table shows the relative extent to which the different commodity groups contribute revenues in excess of out-of-pocket costs. It will be observed that in the Eastern district Group V, consisting of "Manufactures and Miscellaneous" freight, although constituting only 29.57 per cent of the total tonnage in that district, contributed 53.5 per cent of the total revenues in excess of the out-of-pocket costs, which is a greater contribution than made by any commodity group, including "Products of Mines."

Since, as found by the Commission, the railroads as a whole in Official territory have operated at a profit there can be no question that the class rates applicable to the movement of carload traffic in Official territory are very profitable and that they do not throw a burden upon other traffic.

With regard to less-carload shipments statistics included in the Commission's report (p. 611, R. 226) show that in 1939 they constituted only 1.61 percent of the total tonnage of the railroads in Official territory and produced only 7.06 percent of their total revenue from carload and less-than-carload traffic combined. In the South less-than-carload traffic was only 2.75 percent of the total traffic and yielded 11 percent of the total revenue, while in the West the corresponding figures are 1.5 percent and 6.77 percent respectively. Moreover, not all less-than-carload traffic moves on class rates (p. 569, R. 184).

It is therefore apparent that even if there were findings and evidence to support such findings that the class rates in Official territory are less than compensatory for the transportation of less-carload traffic, this would not warrant an order requiring an increase in all class rates, including the class rates on the very large volume of carload traffic for which, as just shown, the class rates are highly compensatory.

However, any suggestion that even the less-than-carload rates fell so far short of providing adequate compensation to the railroads as to justify a minimum rate order requiring that they be increased is answered in the first place by the Commission's action with respect to the class rates in Western Trunk Line territory. The Commission found (p. 585, R. 200) that based upon 1939 statistics the losses incurred by the carriers in the West in the handling of less-than-carload traffic were relatively and actually much greater than any losses incurred by the carriers in Official territory (p. 585, R. 200). Nevertheless it or-

dered the class rates in Western territory *reduced* 10 percent. This is obviously inconsistent with the requirement that the class rates in Official territory be increased 10 percent, if predicated upon any idea of the non-compensatory character of the less-than-carload rates.

Moreover, Dr. Edwards' cost computation (Exhibit 13, R. 5917) shows that for a loading of only 6.5 tons of less-than-carload freight per car the first, second and third class rates in Official territory, which are probably the most commonly used for less-carload freight, exceed out-of-pocket cost plus solely related expenses.

C. There is no finding and no evidence to support a finding that the level of the class rates for transportation within Official territory threatens a rate war or otherwise will tend to impair the financial integrity of the carriers.

The Commission does not suggest nor is there the slightest indication of any evidence that the fact that the class rates for transportation within Official territory are upon a lower level than those of the class rates in Southern and Western territories threatens a rate war or a competitive reduction in rates, which will impair the financial ability of the railroads to render adequate service to the public.

When it is borne in mind that the present class rates were prescribed by the Commission itself as maximum reasonable rates, it is obvious that a finding that they now are so low as to invite a rate war would be absurd. These rates have been in effect since the Commission's decision in the *Eastern Class Rate Case* for a period of over ten years and it is to be assumed that both carriers and shippers have become adjusted thereto.

D. The Commission's finding predicated upon the returns from Operations of the Carriers in the several territories, that "the revenue needs of the carriers in official territory with respect to their class-rate traffic are greater than is the case as to the class-rate traffic of the carriers in the other territories" is not a finding that the class rates for transportation in Official territory are non-compensatory, sufficient to sustain a minimum rate order requiring an increase in those rates

At page 705 (R. 320) of its original report, after stating its determination that the class rates in Official territory should be increased 10 percent, the Commission said further:

> "This finding as to the justness and reasonableness of the intraterritorial official class rates is based in part upon a consideration of the returns from operation of the various respondents in the several territories as reported to us, which we have considered pursuant to stipulations of record. From those returns and the whole record we find and determine that the revenue needs of the carriers in official territory with respect to their class-rate traffic are greater than is the case as to the class-rate traffic of the carriers in the other territories described."

At page 613 (R. 228) of its report the Commission stated that the rate of return of the railroads in the Southern region generally had been a little higher than that of the Eastern district railroads during the six-year period 1936-41 and during the seven-year period 1936-42. Quite different figures of rates of return for the carriers in the Eastern district for the years 1939-41 are set forth in a table on page 657 in the Commission's original report (R. 272). The rates of return for the Eastern district railroads in each of the last three years shown were higher than corresponding figures for the railroads of the Western district, which hardly lends support for the finding of the Commission previously quoted.

However, whatever may be the relative figures as to rates of return on property investment, it is submitted that they afford no indication as to the profitableness or the opposite of the class rates. The rates of return are composites of earnings on all traffic and considering the percentages of freight upon which the class rates are charged, it is difficult to see how a comparison of the rates of return for the entire freight business of the railroads affords any indication that the class rates alone do not contribute adequately to the total of the carriers' revenues.

There is not a scintilla of evidence showing that the revenues of the carriers in Official territory from their class rates are not sufficient to enable them to provide adequate and efficient service. On the contrary, the evidence establishes, as has been shown above, that the class rates are highly profitable and they are the highest rates charged in Official territory.

Neither is there a preliminary finding or evidence that would support the view that an increase in the class rates would produce increased revenues. Indeed as to "the effect of rates on the movement of traffic" the Commission's own findings indicate that an increase in the class rates may well discourage their use and drive the carriers to establish exception and commodity rates.

In such circumstances this Court has held invalid orders of the Commission requiring increases in rates for the purported purpose of increasing revenues. In *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499 (1934), which involved the validity of an order of the Commission requiring the respondent carriers to cancel reduced interstate rates on coal on the ground that such rates would cause a depletion of the carriers' revenues in violation of Section 15a(2), the Court held that the Commission's ultimate finding was invalid because it was not supported by an appropriate finding of fact that the carriers' revenues actually would be depleted thereby. Citing as authority its deci-

sions in *Florida* v. *United States*, 282 U. S. 194 and 292 U. S. 1, the Court said at pages 507 and 508:

> "There is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy. *'The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage.'* *Florida* v. *United States, supra*, at p. 214. As applied to the Indiana groups, the broad conclusions of the report, when related to the supporting findings, amount to this and nothing more, that the new schedule for Milwaukee is likely to be followed by new schedules maintaining the same ratio for other lines in Indiana. Even if the outcome for those lines is a diminution of the profits (the return being none the less compensatory), this without more does not make it wrongful for Milwaukee to restore the long standing parity between Brazil and Springfield. At the very least the findings should inform us, if only approximately, of the extent of the expected loss; they should make it clear whether the impairment of revenues will be trivial or substantial, for only thus can the impairment be related to capacity for service. Cf. *Florida* v. *United States*, 292 U. S. 1, 9. Nothing of the kind is shown." (Italics added.)

In *Florida* v. *United States*, 292 U. S. 1, the Court, discussed its prior decision in 282 U. S. 194, in which it had set aside an order of the Commission requiring an increase in intrastate rates because the Commission had failed to make requisite findings that the increases would satisfy the mandate of Section 15a that they increase the carrier's revenue. The Court said at page 8:

> "• • • in considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question was that of the relation of rates to income. But *to support the order then under review, the Commission had made no findings* as to the revenue which had been derived by the carrier from the traffic in

question, or which could reasonably be expected under the increased rates, or *that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service. Florida* v. *United States, supra*" (282 U. S. pp. 212, 214, 215, 75 L. ed. 302, 303, 304, 51 S. Ct. 119). (Italics added.)

Again in *North Carolina* v. *United States,* 325 U. S. 507, the Court said at page 516:

> "The Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intrastate rate fixed by North Carolina."

Certainly, the statement of the Commission regarding comparative rates of return cannot be held to satisfy the requirements recognized in the foregoing cases for a finding that the class rates for transportation in Official territory are not fully compensatory.

It is submitted, therefore, that there is absolutely no foundation in essential findings or in the evidence for a decision by the Commission that the class rates for transportation within Official territory, prescribed by the Commission as maximum reasonable rates, to which carriers and industries have become adjusted over several years, are now less than minimum reasonable rates in violation of Section 1(4) and (5) or for an order, in exercise of the Commission's minimum rate power, requiring a 10 per cent increase in those rates.

POINT II

To the extent that the orders purport to rest upon a determination that the present class rates create undue prejudice and preference in violation of Section 3 (1) of the Interstate Commerce Act, the orders are arbitrary and invalid because not supported by essential preliminary findings and because without support of substantial evidence. The court below erred in not so deciding.

The foregoing point has dealt with the lack of essential findings and of evidence to support the Commission's decision that the class rates in Official territory are less than minimum reasonable rates in violation of Section 1(4) (5)(a) because less than the class rates in the South and West, and that the latter are in excess of maximum reasonable rates in violation of the same sections because higher than the class rates in Official territory. The Commission rests its orders requiring an increase in the rates in Official territory also upon an ultimate finding that the relation between the interterritorial class rates applicable to transportation from Southern, Southwestern, and Western Trunk Line territories to Official and Illinois territories, on the one hand, and the intraterritorial class rates applicable within Official and Illinois territories, on the other hand, causes undue and unreasonable preference and advantage

> "to official and Illinois territories as a whole and the shippers and receivers of freight located therein, and subjects * * * southern, southwestern, and western trunk-line territories as a whole and the shippers and receivers of freight located therein to undue and unreasonable prejudice and disadvantage, in violation of section 3(1) of the act." (Ultimate Finding 3, p. 701, R. 316.)

It is submitted that this ultimate finding is arbitrary and invalid because without support in essential pre-

liminary findings of fact, because there is no evidence of record to support necessary preliminary findings of fact, and because the ultimate finding proceeds from an erroneous view of the law.

A. The Law

Section 3(1), the pertinent portions of which are quoted in Appendix A of this brief, prohibits "undue or unreasonable preference or advantage" and "undue or unreasonable prejudice or disadvantage" to

> "any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic. * * *."

The words "region, district, territory" were added to this section by the Transportation Act, 1940. The Commission rests its orders in large part upon the claim that this amendment changed the law not only as to the subjects of prohibited preference and prejudice but also as to what constitutes preference and prejudice and what must be found in order to support an ultimate finding of a violation of this section. This contention will be dealt with in a later point. As a background to this later discussion, however, and also because the Commission finds undue prejudice and preference not only as between "territories as a whole" but also as between "the shippers and receivers of freight located therein", as to whom no change in this section of the law was made by the 1940 amendment, it is pertinent to examine the authorities briefly to discover what facts must be established and found in order to support an ultimate finding and order under this section.

First of all, it is obvious that no finding of undue prejudice and preference as between either territories or shippers and receivers of freight can be found because of differences in the levels of the class rates unless it appears that the corresponding class rates are the rates actually

charged or demanded in each instance. Thus, if a particular kind of machinery is classified fourth class in Official territory but is classified sixth class in the Southern classification for purposes of transportation from the South to the North, the fact that the fourth class interterritorial rate is higher than the fourth class rate for transportation within Official territory would not mean that there is a difference in the rates actually charged upon which to base a finding of undue prejudice and preference. Similarly, if the Official territory railroads charge class rates on certain freight but for transportation of the same freight from the South or west to markets in Official territory the railroads have established exception or commodity rates materially lower than the class rates, the differences in the levels of the class rates themselves are entirely academic and immaterial.

Hence, the very first requisite to an ultimate finding of undue prejudice and preference based upon differences in the levels of the class rates is a finding and proof that on the same commodities on which class rates are charged in Official territory the railroads charge or demand corresponding class rates for transportation from the South, Southwest and West into Official territory.

Moreover, it is well settled both by decisions of the courts and by long administrative interpretation reflected in the reports of the Commission, that discrimination is something more than difference and that a mere showing of differences in rates does not establish undue prejudice and preference in violation of Section 3(1). *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627; *Indianapolis Freight Bureau* v. *Cleveland C. C. C. & St. L. Ry. Co.*, 23 I. C. C. 195; *Pensacola Chamber of Commerce* v. *Louisville & N. R. Co.*, 98 I. C. C. 567; *Hurst* v. *Boise Valley Traction Co.*, 146 I. C. C. 625.

For a finding of undue preference and prejudice there must be a preliminary finding and proof of a competitive relationship between the party preferred and the party

prejudiced, so that the difference in rates is the source of benefit to the former and injury to the other. *City Ice & Supply Co.* v. *C. & N. W. Ry.*, 36 I. C. C. 514, 517; *Boston Wool Trade Asso.* v. *B. & A. R. R. Co.*, 78 I. C. C. 178, 183; *Paper and Paper Articles to New Orleans*, 96 I. C. C. 600, 608; *Dewey Portland Cement Co.* v. *Alton & E. R. Co.*, 176 I. C. C. 671, 685.

The following excerpts from the multitude of decisions by the Commission illustrate the long and consistent administrative interpretation of Section 3(1). In *Alexandria Paper Co.* v. *Atchison, T. & S. F. Ry. Co.*, 171 I. C. C. 252, at pages 257-258, the Commission said:

> "With respect to the three points at which the other producing points have an advantage the record will not support a finding of undue prejudice, as there is no showing of a competitive situation thereat as between complainant and its competitors."

In *Western Carolina Shippers' Assn.* v. *Asheville S. Ry. Co.*, 174 I. C. C. 353, it said at page 358:

> "The rates assailed to the complaining points do not appear to be properly aligned with the rates to the points alleged to be preferred, but the record contains no evidence of competition between the complaining points and the alleged preferred points; therefore a finding of undue prejudice can not be sustained."

Moreover, since it is only *undue* or unreasonable prejudice and preference which are prohibited, it has been held that the difference in rates must be found to be the cause of substantial injury to the party found to be prejudiced, and of substantial benefit to the other. *Smith Bros. Mfg. Co.* v. *Aberdeen & R. R. Co.*, 181 I. C. C. 137.

In *Adams Lbr. Co.* v. *Akron, C. & Y. Ry Co.*, 253 I. C. C. 179, 189, it was stated:

> "A mere disparity in rates is not sufficient to establish undue prejudice. In order to establish the fact

that there is undue prejudice and preference, the evidence must establish that the alleged prejudice and preference constitute a source of undue disadvantage to one party and of undue advantage to another. *Danville Chamber of Commerce, Inc.* v. *Southern Ry. Co.*, 209 I. C. C. 571, 572."

In *Mason City Brick and Tile Co.* v. *C., M. St. P. & P. R. Co.*, 258 I. C. C. 312, the Commission said at page 313:

> "A disparity of rates does not necessarily result in undue prejudice, and a mere showing that rates of long standing in one group are higher than those in another group does not establish undue prejudice. No group adjustment can effect exact justice in rate making, and the small disadvantage to one point or another incident to such an adjustment does not constitute the undue prejudice made unlawful by section 3 of the act. See *Prine Lbr. Co.* v. *Ann Arbor R. Co.*, 156 I. C. C. 349, 353. The rate relation must be a source of positive advantage to another and of disadvantage to complainant."

In *Carbon Limestone Co.* v. *Pennsylvania R. Co.*, 173 I. C. C. 167, it was stated that the proof to support findings under section 3 "must be definite and convincing" (p. 172).

Similarly in *Northeastern New York Traffic Assn.* v. *Delaware & H. R. Corp.*, 200 I. C. C. 134, the Commission stated at page 146:

> "* * * Complainants' evidence consists of a mere showing of disparity of rates and of general declarations as to competition and injury supported by evidentiary facts, and a finding of undue prejudice is not warranted."

Again in *Alabama Rock Asphalt, Inc.* v. *Abilene & S. Ry. Co.*, 176 I. C. C. 555, it was said at page 565:

> "* * * The evidence dealing with the alleged undue prejudice resulting from the rate adjustments in effect

from the southwestern producing points mentioned and Bowling Green is so general in nature, however, that we are not justified in making any finding of undue prejudice and preference under section 3. While undue prejudice and preference may be established by a preponderance of evidence, that evidence must be such as to make reasonably clear how and where the prejudice and preference result from a rate maladjustment of which complaint is made. That may not be assumed or left to mere inference. Barrett Co. v. Atchison, T. & S. F. Ry. Co., 172 I. C. C. 319, 333. The record contains no substantial evidence that the Texas intrastate rates unduly prejudice the southeastern complainant or discriminate unjustly against interstate commerce."

In *United States* v. *Director General*, 80 I. C. C. 143, the Commission said:

"It is contended, but not shown, that the lack of industries and communities on the Wharton is due to the rate adjustment here assailed. A finding of undue prejudice cannot be based upon assumptions such as these."

See also *House Heating Furnaces from East to Pacific Coast*, 255 I. C. C. 787, 792; *Gwinn Milling Co.* v. *Pennsylvania R. Co.*, 255 I. C. C. 690, 694; *Pure Oil Co.* v. *Atlantic Coast Line R. Co.*, 256 I. C. C. 723, 731.

Again, Section 3(1) has been construed as prohibiting differences in rates to competing shippers or localities only where the transportation is performed under similar circumstances or the rates are influenced by similar conditions. Section 2 of the Interstate Commerce Act, which likewise contains a prohibition against discrimination, in express terms limits the prohibition to the charging of different rates "in the transportation of a like kind of traffic under substantially similar circumstances and conditions." These latter words are not found in Section 3. However, it has been consistently held that Section 3 is to

be construed and enforced as though these words were included therein, *Board of Trade of Carrollton, Ga.* v. *Central of Georgia Ry. Co.*, 28 I. C. C. 154; *Clover Splint Coal Co. Inc.* v. *Louisville & N. R. Co.*, 197 I. C. C. 276, 277.

Consequently, where the disparity in rates is due to differences in transportation conditions there is no basis for complaint by the shipper paying the higher rates even though such rates prevent or impede the doing of business in particular markets or territories. To regulate rates in such circumstances to enable shippers to reach markets would not constitute regulation of transportation charges but would constitute an attempt to equalize the advantages and disadvantages of the competing shippers. Thus carriers may not disregard the more unfavorable commercial and geographical conditions under which competing shippers operate with a view of placing them on an equality with shippers doing business under more favorable conditions. Nor does the Commission possess the authority to require carriers to equalize the fortunes of their shippers. *United States* v. *Illinois Cent. R. Co.*, 263 U. S. 515, 524; *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 473.

Finally since Section 3(1) is a prohibition directed to the carriers, there can be no ultimate finding of a violation thereof unless there is a preliminary finding that the same carrier or carriers are responsible for or control both the preferential and the prejudicial rates, because a carrier cannot be held to violate the statute by something for which the carrier is itself not responsible and which, pursuant to an order of the Commission, it is powerless to correct. *Texas & Pacific Ry. Co.* v. *United States* 289 U. S. 627 (650); *Central R. of New Jersey* v. *United States*, 257 U. S. 247, 66 L. ed. 217, 42 Sup. Ct. 80.

The Commission's report will be searched in vain for the foregoing essential preliminary findings, and we sub-

mit that an examination of the record will disclose an absence of proof of the facts necessary for such preliminary findings and for an ultimate finding of a violation of Section 3(1).

B. There is no finding and no evidence to support a finding that for the transportation of the same kinds of freight from the South and West to Official territory on which class rates are charged within Official territory the railroads demand corresponding class rates. In fact both the findings and the evidence are to the contrary.

As has been said, in order to support the Commission's ultimate finding that the differences in the levels of the class rates within Official territory and those published from the South and West into Official territory result in undue preference and prejudice as between Official territory and shippers therein and Southern and Southwestern territories and shippers in those territories, the first essential finding would be that the corresponding class rates are actually charged to or demanded of competing shippers in the several territories. There would obviously be no justification for increasing the class rates charged to a manufacturer of electrical equipment in Official territory to the level of the class rates prescribed for transportation from the South to Official territory on the ground that the difference in the class rate levels gives the Official territory manufacturer a preference and subjects his southern competitor to prejudice unless his southern competitor is actually required to pay the higher interterritorial class rates. The Commission's reports contain no such finding. On the contrary, the findings and discussion in the reports, as well as the evidence, negative the existence of this essential foundation for an ultimate finding of a violation of Section 3.

First of all, a difference in the levels of the class rates would not mean a difference in the rates charged for the

transportation of a particular commodity in the different territories unless the commodity is accorded the same classification rating for transportation within Official territory as for movement from the South and West into that territory. For example, if an article is classified second class or 85 per cent of first class in Official territory but is classified fourth class or 55 per cent of first class for interterritorial movement (see Report, p. 467, R. 82), although the first class rate might be 30 per cent higher in Official than in Southern territory for a given distance, the freight charge paid by the southern shipper for the transportation of this particular commodity would actually be less than the freight charge paid by the northern manufacturer. That there are a great many articles where the classification ratings are different in the several territories so that the differences in the levels of the class rates do not reflect differences in the freight charges demanded or paid, is made clear by the Commission's discussion and findings at pages 469 to 475 of its report. Thus the Commission said (pp. 469-470, R. 84-85):

> "Despite the relatively high degree of uniformity in any-quantity and less-than-carload ratings, substantial disparities exist on individual article items as indicated in appendix 4 to this report. Thus, on certain items, on which the ratings are stated for any quantity, southern classification is never higher than either official or western, but has one rating of class 55 for which the two others name class 100, whereas official and western are alike in all but one such rating. As to less-than-carload, on items rated class 50 in official the ratings in southern range from classes 30 to 70, and in western from classes 55 to 85; on items rated class 70 in southern the ratings range from classes 50 to 100 in official, and from classes 55 to 85 in western; and on items rated class 55 in western the ratings range from classes 40 to 100 in official, and from classes 30 to 100 in southern.
>
> "Still greater variations, relatively, are presented in the carload ratings, set out in appendix 5, of which

the following are examples; on items rated class 35 in official, the ratings in southern and western both range from classes 17½ to 55; on items rated class 40 in southern, the ratings in official range from classes 27½ to 70, and in western, from classes 17½ to 40; and on items rated class 45 in western, the ratings in official range from classes 27½ to 85, and in southern, from classes 30 to 55."

On page 508 (R. 123), the Commission found:

"Abundant evidence has been received showing that the differences in classification ratings compel shippers, in each of the classification territories, to pay on certain articles transportation rates that are relatively higher than the rates paid on the same articles by shippers in one or both of the other territories, considering present class-rate levels in the respective rate territories. *In fact, on many articles a shipper in a lower-rated territory must pay higher rates than one in a higher-rated territory, owing to differences in classification ratings. The showing made is typical of the entire situation at present,* and would continue so with whatever rate level or levels we may find lawful in docket No. 28300 or in any other proceeding." (italics ours.)

Then, too, the Commission's findings and discussion make it clear that there is a very substantial volume of freight for the transportation of which class rates are charged in Official territory but which is transported at commodity or exception rates from other territories into Official territory, so that again the differences in the levels of the class rates could not be the cause of undue prejudice and preference. This is shown by the Commission's finding that whereas 5.8 per cent of all carload freight transported within Official territory is charged class rates, only .9 per cent of the carload freight shipped from Southern territory into Official territory moves at class rates while 4.9 per cent has exception rates and 94.2 per cent is accorded commodity rates (pp. 479, 564, R. 94, 179).

This point finds further confirmation in the Commission's summary of the testimony of the few individual southern shippers who appeared as witnesses. They were called as witnesses for the Southern Governors Conference and presumably their testimony was offered as typical of the experience of southern shippers. The Commission's summary of the testimony of these nine shippers (pp. 615-619, R. 230-234) shows that all but two shipped to Official territory at commodity or exception rates. At page 618 (R. 233), the Commission records that the secretary and manager of the Atlanta Freight Bureau, who was the principal rate witness for the Southern Governors,

> "introduced in evidence an exhibit listing 14 groups of commodities, the rates on which were claimed to have been detrimental to southern shippers. Only 6 of the 14 move on class rates."

Again, in discussing the testimony presented on behalf of Southwestern shipper interests the Commission found (pp. 665-666, R. 280-281):

> "*We have referred to the fact that a comparison of first-class rates within or between territories does not, in most instances, reflect the differences between the rates on which the traffic moves. That observation is particularly suitable to the Southwest.* The extent to which exceptions have been published within, and to and from, that area is not specifically shown of record, but there is general testimony to the effect that *the class rates in issue move only a small proportion of the total traffic.* This is supported by the study made by a member of our staff showing the proportions of traffic transported on 1 day in 1942 on class rates, exception rates, and commodity rates.
>
> * * * * * * *
>
> "It will be noted that, on the day mentioned, *95.1 per cent of the total traffic transported from southwestern to official territory moved at commodity rates, and that only 1.5 per cent moved at class rates,*

whereas of the total from official to southwestern territory 22.5 per cent was transported at class rates, and 25.5 per cent at commodity rates. Although the proportions of traffic moved at class, exception, or commodity rates between southwestern territory and other territories vary, a great preponderance of the traffic, except from official territory, moved at commodity rates. *The levels of the commodity rates are much below the class-rate levels.*" (Italics added.)

Thus, not only is there a complete absence from the Commission's reports of a finding of the first essential fact to support its ultimate finding that the differences in the levels of the class rates from the South and West to Official territory and those within Official territory cause undue prejudice and preference, but the findings which the Commission has made and the discussion of the evidence in the reports negative the possibility of such an essential preliminary finding.

C. The Commission's findings negative any conclusion that the differences in the levels of the class rates are the cause of substantial injury, prejudice and disadvantage to shippers or receivers of freight in the South and West or to those territories as a whole and of preference and advantage to Official territory and shippers therein

If, as is submitted, there can be no valid determination that rates are unlawful in violation of Section 3 without a preliminary conclusion that the differences in rates are the cause of substantial injury and benefit, then the Commission's findings as to the effect of the rate differences must support such a conclusion and the evidence in turn must sustain the findings. That is certainly not the case here.

In their briefs in the court below the appellees, confronted with a complete absence of any findings by the Commission which would support a conclusion that the

differences in the levels of the class rates are the cause of substantial injury either to shippers and receivers in the South and West or to those territories as a whole. went to great lengths in discussing the testimony of witnesses on this point.

It is, of course, the function of the Commission to weigh the evidence and make findings of fact on the basis thereof, and if it fails to do so it is no part of the duty of the Court to examine the record for the purpose of making findings which the Commission has failed to make. The record is to be examined only to ascertain whether the evidence sustains those findings which the Commission has embodied in its report after weighing the evidence. In *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, this Court said (pp. 504-505):

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida* v. *United States, supra.* Orderly review requires that this objection, being basic and jurisdictional, be disposed of at the beginning."

On the subject here discussed the Commission's reports contain clear preliminary findings evaluating the evidence upon this essential issue. If, nevertheless, the Court will go to the record and examine the testimony, to which appellees will doubtless make reference, of various witnesses with regard to their alleged objections to the differences in rate levels, it will find that either on the basis of further facts developed on cross examination or be-

cause the testimony of the witnesses themselves on direct examination indicated that they were not concerned with the class rates at all, or because it appeared that the witnesses' businesses had greatly prospered under the rates, the Commission's summary of the evidence correctly evaluates it. And it is submitted here that this summary negatives any conclusion that either shippers in the South and West generally or Southern and Western territories as a whole suffer injury by reason of the differences in the levels of the class rates.

Before examining the Commission's findings on this point, it is pertinent to observe that this conclusion naturally follows from at least two facts previously mentioned: first, that to a very large extent the railroads have provided exception or commodity rates for the movement of goods from Southern and Western territories to Official territory, so that the differences in the levels of the class rates are immaterial as to a large part of the freight movement; and second, that frequently Southern producers have the benefit of low inbound raw material rates which they are unwilling to surrender despite their pleas for rate uniformity.

The Commission has summarized the testimony of all of these southern witnesses at pages 615 to 619 of its report (R. 230-234). This summary can only be construed as a finding that there is no evidence that the differences in levels of the class rates are the cause of injury, prejudice and disadvantage to individual shippers in the South. This was the conclusion reached and forcefully stated by Commissioner Porter at pages 719 and 720 of his dissent (R. 334, 335), and concurred in by Commissioner Barnard (R. 340, ff.). For convenience, we repeat the Commission's summary of this testimony, adding paragraph numbers as an aid to discussion. The Commission stated:

"The testimony of shippers called on behalf of the Southern Governors' Conference respecting the payment of class rates may be summarized as follows:

(1) A manufacturer of washboards at Raleigh, N. C., ships washboards in less than carloads on class rates. In September 1941, a representative month, he made 42 less-than-carload shipments to official territory on which he paid total charges of $184.06. Charges on the official territory level would have been $15.14 less. One shipment was made to Dallas, Tex., on which he would have saved 77 cents at the official territory level. Twenty-five shipments were made to points in southern territory. Charges on the official territory level would have been $45.77 less than actually paid. The principal competitors are at Columbus, Ohio, and Saginaw, Mich., the latter with a branch factory at Memphis, Tenn. If the official territory level had applied not only from Raleigh, but also from Columbus to the South, the charges from Columbus would be reduced by greater amounts than from Raleigh. Application of the official territory level of rates on the September shipments to the North would have reduced his freight charges by 8 per cent. Twenty-five per cent of the shipments to the North were to Detroit, Mich., a short distance from Saginaw, where one of his chief competitors is located. The business of the manufacturer who gave this testimony however, has increased substantially.

(2) The operator of a tanning plant at Andrews, N. C., testified that he had recently taken over the tannery at that point, which had been out of operation for several years, and in May 1942, began tanning operations. As of the date of the hearing, September 28, 1942, the company was beginning to make out-bound shipments of leather to some of the 20 principal points to which leather moves, most of which are in official territory. While most of the shipments will be in carloads, on which both class and commodity rates apply, some less than-carload shipments are anticipated, on which the class rates will apply. Between May 22, 1942, and June 18, 1942, he shipped

9 carloads of green salted hides, 6 from New York, N. Y., 2 from Harrison, N. J., and 1 from Detroit, Mich., and 5 carloads of dry hides, 3 from New York, 1 from Brooklyn, N. Y., and 1 from Waverly, N. J., on which class rates applied. The total charges at the applicable class rates were $6,063.45, whereas the total charges at the official territory level would have been $4,504.63. Leather is usually sold f. o. b. tannery or warehouse. This company has experienced difficulty in selling and quoting prices competitive with tanneries able to ship at lower freight rates.

(3) Imported hides now move from the New York area to Andrews. Under present war conditions most steamers discharge at New York, but, in peacetime, cargoes of hides could be discharged at Norfolk or New Orleans, and this company might obtain imported hides through those ports. This company will also use domestic hides which will be obtained principally in Chicago, Ill., Detroit, Mich., and St. Louis, Mo. There are very few hides produced in the South. However, in *Schoen Bros., Inc.* v. *Erie R. Co.*, 255 I. C. C. 501, 258 I. C. C. 161, we prescribed reasonable rates on green salted hides from certain points in Alabama, Georgia, and Florida, to Endicott, N. Y., and from Atlanta, Ga., to Boston, Mass. The four principal markets for finished leather are New York, St. Louis, Chicago, and Philadelphia.

Quebracho extract, used in tanning, is imported. The differences in freight rates on this commodity are said to be more drastic than on hides and leather, but no exhibit was introduced showing these rates. Chestnut extract, also used in tanning, is produced in the South and the freight rate is a very small cost factor.

(4) A shipper of wine at Atlanta complained of the rates on wine from that point to official territory. The witness knew little about rates, and an exhibit prepared by his traffic man was erroneous. The applicable rates to most of the points shown on the exhibit are combination rates, one factor of which are exception rates from Atlanta to border points. His principal competition comes from New York City, but he also operates a winery at Brooklyn, N. Y. His

product is nationally advertised and he does a nation-wide business. A larger plant has recently been constructed at Atlanta indicating that the business has made substantial progress at that point.

(5) Testimony for a manufacturer of macaroni products at Memphis, Tenn., was offered by the manager of the Memphis Freight Bureau. For example, from Memphis to Evansville, Ind., 301 miles, the rate on macaroni and noodles and spaghetti, in less than carloads, is 68 cents, whereas from Chicago, 284 miles, the rate is 48 cents, a difference in favor of Chicago of 20 cents. If both rates were made 50 percent of the eastern first-class scale they would be 49 cents and 48 cents, respectively, and the rate advantage of 20 cents which Chicago has would be reduced to 1 cent. This shipper has never complained to the railroads about his rates, which are fourth class (50 percent of first class) in official territory and, by exception, class 50 in the South, in less than carloads. In *Macaroni & Noodle Mfrs. of America* v. *Alabama G. S. R. Co.*, 50 I. C. C. 289, the fourth-class rating was found not shown to be unreasonable or unduly prejudicial for all territories. In the South, fourth class is 55 percent of first class. This shipper has competitors at Louisville, Ky., and New Orleans, La., and distributes his products throughout the South and to Kentucky and some Ohio River points.

Five other shippers who testified on behalf of the Southern Governors' Conference do not ship their products on class rates. They testified with respect to furniture from Birmingham, Ala., glass bottles from Chattanooga, Tenn., cucumber pickles from Faison, N. C., peanut products from Columbus, Ga., and grading machinery from Toccoa, Ga., and Vicksburg, Miss.

(6) Present rates on glass bottles from Chattanooga to official territory are on a combination basis, using a commodity rate to Cincinnati, plus exception rates beyond. Approximately 25 percent of the production of the shipper who testified is shipped to the North, although he has only a 'limited amount of tonnage' to offer in that territory. His sales have also been extended to the West.

(7) The pickle manufacturer ships 25 percent of his output of salt stock and brine pickles to the North, and the finished product to the North and South. The applicable rates are truck-competitive rates and are lower than the normal official territory level of rates. The witness's chief concern is that his present rates might be increased.

(8) The shipper of peanut products ships them to all parts of the country, except New England, on rates lower than class rates. The company purchases a million dollars worth of peanuts annually and has annual sales of 5 million dollars.

(9) The manufacturer of grading machinery ships his products all over the world. His first plant in the East was at Peoria, Ill. Later he established plants at Toccoa and Vicksburg. He made no complaint about his rates and testified that the plants were established in the South because of the many advantages in that territory."

As will be seen from the foregoing, the Commission found that only two of the industries or shippers represented by these witnesses shipped their products on class rates. These were a manufacturer of washboards in Raleigh, N. C., referred to in paragraph 1 above, and an operator of a tanning plant in Andrews, N. C., referred to in paragraph 2. The washboard manufacturer's business had increased substantially in recent years and about 25 percent of his shipments were sold at points in Official territory in proximity to Saginaw, Michigan, where one of his competitors was located. The operator of the tanning plant at Andrews, N. C., started operations in May 1942 and most of his output was intended for movement to Official territory in lots consisting of carload and less-than-carload shipments. This witness testified that he was subjected to "considerable difficulty" in meeting the competition of other tanneries (R. 1517-1521). In its summary the Commission states that the tannery products move on both class and commodity

rates, but it was testified by a witness that the rates on which these products moved are commodity rates (R. 4003, 4004).

The shippers of the other products referred to in the above numbered paragraphs do not, as is indicated, make use of class rates in the shipment of their products and consequently their testimony is of no relevancy. In fact, certain of these shippers said that they had no complaint about their rates and that they had established their plants in the South because of the many advantages in that territory. See, for instance, the testimony of the witness referred to in paragraph 9.

In so far as individual shippers in the South are concerned, it is to be assumed that the widely publicized hearings called forth all who had grievances against the class rates. And certainly it can be inferred that the vigorous counsel who represented the Southern Governors brought to the witness stand all who could be found who would testify on the point. The result as shown by the Commission's findings was that out of the thousands of manufacturing establishments in the South, representatives of exactly nine appeared as witnesses. Of these only two shipped at class rates, and of these two the business of one, a manufacturer of washboards at Raleigh, N. C., had substantially increased in recent years, while the other, a tanning plant, had begun operations only four or five months before its representative testified and was already "beginning to make shipments to the 20 principal points to which leather moves, most of which are in official territory" (Report, p. 616, R. 231).

The Commission, at page 618 of its report (R. 233), also referred to the testimony of the Secretary and Manager of the Atlanta Freight Bureau, appearing for the Southern Governors, who presented testimony purporting to indicate shipper dissatisfaction with southern class rates.

This witness introduced evidence listing fourteen groups of commodities, the rates on which were claimed to have been detrimental to southern shippers. As pointed out by the Commission, however, only six of the fourteen moved on class rates. These consisted of calendars, electric appliances, lead products, iron or steel tanks, cloths and rags. As to the electrical appliances, the Commission referred to its decision in the *Southern Governors* case in which the rates on these commodities had been dealt with. With regard to the other commodities, it appears on the basis of the Commission's own statements either that the shippers shipped their entire output to southern points and had never asked the railroads for competitive rates to the North, or that the class rates appeared to be of no controlling importance in the sale of the products.

At page 618 of its report (R. 233) the Commission also refers to the testimony of a witness for the Nashville Freight Bureau who criticized the railroads for failure to reduce rates on steel automobile truck bodies from Nashville, Tenn. to Metuchen, N. J. This witness made no complaint against the general level of the class rates or the territorial relationships. Even as to the particular rates complained of, it appears that they did not prevent him from shipping his product to Metuchen. This witness criticized the rates also on shell boxes from Nashville to all points in Official territory. It appears however that the rates that he sought had actually been established to thirteen destinations, which presumably were all that he was interested in.

Thus, based upon the Commission's own summary, it appears that the record contains evidence on the question of discrimination by not more than five or six shippers located in Southern territory who use class rates. Even as to these five or six shippers, the evidence in some

instances is decidedly vague and involves criticism of the rates only from specific origin points to specific destinations. No claim is made by any shipper or group of shippers that the class rates, as a whole, in Southern and Official territories result in unjust discrimination against southern shippers. The few specific origin points involved cannot be considered representative of Southern territory as a whole nor is there any finding by the Commission that they were.

With all earnestness, it is submitted that the foregoing evidence does not constitute proof sufficient to sustain a finding that the differences in the levels of the class rates are the cause of substantial injury and undue prejudice to southern shippers—much less to Southern territory as a whole.

In regard to the West, the Commission records (p. 673, R. 288) that "only three commercial witnesses, speaking for individual establishments in the Southwest and Western Trunk Line territory testified in this proceeding." These were a steel manufacturer at Denver, Colo., who uses class rates to a very limited extent and did not advocate rate parity with Official territory; a manufacturer of coal-washing machinery at Pittsburg, Kan., and a manufacturer of lamps and stoves at Wichita, Kan. The last two testified that they shipped most of their products to Official territory. The Commission said that "neither complained that the rate adjustment had discouraged or barred their enterprises from locating where they are" (p. 673, R. 288), and, as pointed out by Commissioner Porter in this dissenting opinion (pp. 720, 721, R. 335, 336), neither of them "left any impression that he was hurt by the present adjustment."

Turning next to Southwestern territory, there was again no finding and no evidence that the differences in the class rate levels have been the cause of prejudice or injury to any shippers. No individual shipper testified in criticism

of the existing class rates applying from the Southwest to Official territory. There was presented, however, a witness, Professor Frederick of the University of Texas, who glibly referred to the "economic burden" of the rate disparity upon the business of five shippers. The testimony of this witness is reviewed by the Commission at pages 670 and 671 of its report (R. 285, 286).. As the Commission says, he gave no indication as to whether the rates applicable to the particular commodities to which he had reference were class or commodity rates. Nor does the evidence show the existence of competition between these five concerns in the Southwest and competitors, if any, in Official territory.

With regard to "territories as a whole", it seems plain that they can be the subject of injury, prejudice and disadvantage as the result of freight rates only to the extent that shippers located in the territories are so affected or to the extent that shippers are prevented from locating in the territories or industrial and economic development is stifled by the freight rates.

The first angle in so far as the territories are concerned is disposed of by the evidence and findings just discussed. In other words, there is no finding and no proof that the differences in the class rate levels cause substantial injury to individual shippers in Southern, Western Trunk Line or Southwestern territories and thereby to the "territories as a whole."

As the Commission, itself, remarked in discussing the testimony of the spokesman for the Southwest (p. 671, R. 286):

> "The witness did not specify what part, if any, of the freight charges assessed on the shipments of the five manufacturers studied were at the class rates here in issue; nor the kind (class, exception, or commodity) of rates published in official territory that were used in the comparisons. Undoubtedly many of

the in-bound raw materials, and some of the out-bound finished products such as canned goods and lime, did not move at class rates; and it is unlikely that all the official territory rates were class rates that could be directly affected by the decision in this proceeding. **Apparently, the** traffic of only these five companies was surveyed, with *no attempt to produce a representative cross-section of Texas industries, some of whose freight charges may be lower than those in official territory.*" (Italics added.)

So far as the other angle of the matter is concerned, there is the evidence outlined by the Commission at pages 619-624 of the report, which completely negatives any suggestion that the differences in the class rate levels have curtailed or restricted the industrialization of the South or the location of industries in that part of the country. As illustrative we quote the following findings from the report, which are fully supported by the evidence and certainly dispel any possibility of a preliminary finding that the differences in the levels of the class rates have been or are the cause of substantial injury or prejudice to the "territories as a whole".

"The industrial development of the East is due to many factors other than transportation services and costs, such as climate, soil, natural resources, available water power, supplies of natural gas and coal, and early settlements of population which antedated the building of railroads.

"The principal factors which control the location of industries are: Availability of and cost of obtaining and assembling raw materials, availability of markets, including cost of reaching such markets, adequacy and cost of fuel and power, climate, labor, capital, and, sometimes, momentum of an early start, and the personality of the individual founding the industry. In 1939, freight revenue on commodities in the manufactures and miscellaneous group was but 5.3 per cent of the destination value of manufactured goods. From this it would seem that any differences in freight charges resulting from differences in class rate levels

is only a small fraction of that figure (Report, p. 619, R. 234).

* * * * *

"In order to determine if the South is or is not growing industrially, statistics over a period of years must be examined. Unless otherwise stated, the years used are 1929 and 1939. The following facts are derived from the statistics examined:

"For the 10-year period, 1929 to 1939, the *number of wage earners in manufacturing industries in the country as a whole decreased 11 percent; in official territory, 12 percent;* and in New York State, 13 percent. There was *an increase of 5 percent in the South.*

"There was a 22-percent *decrease in manufacturing wages for the entire country,* 23-percent decrease in official territory, and 3-percent decrease in the South. *Some southern States had an increase.*

"The *values of manufactured products for the entire country decreased 21 percent; in official territory, 25 percent;* in New York State, 29 percent; and there was *a 1-percent increase in the South.* North Carolina had an increase of 8 percent.

"*Value added by manufacture,* for the *United States as a whole, decreased 23 percent,* 24 percent in official territory, 12 percent in the South, and in New York State, 33 percent. *North Carolina had an increase of 7 percent.*

"From 1930 to 1940, there was a greater decrease in agricultural employment in southern than in official territory; but *manufacturing employment increased in the South and decreased in the North.*

"In 1941, *income payments* for the United States were 111 percent of those in 1929, *for official territory 100 percent,* and *for the South 128 percent.*

"From 1930 to 1940, the number of *gainfully occupied workers* in manufacturing in official territory decreased from 70.5 percent to 69.4 percent of the country's total, but *in the South, increased from 10 percent to 11.9 percent.*

"During the period from 1929 to 1939, the number of *wage earners* in the *canned fruit and vegetable industry in the South increased 68 percent,* as com-

pared with an increase of 28 percent in official territory.

"The number of *wage earners* in the *cotton industry in 10 northern States decreased 45 percent*, as compared with *an increase of 12 percent in 6 southern States.*

"*Value of cotton products* decreased 55 percent in the northern States and 12 percent in the southern States, and the value *added by manufacture decreased 48 percent in the North and increased 8 percent in the South.*

"*Manufacture of heating and cooking apparatus*, except electric, during the 10-year period, *increased in the South* and *increased* (should read '*decreased*') *in the North. There was an increase of 39 percent in the number of wage earners in the South*, and a *decrease of 21 percent in the North. Value* added by manufacture *increased 8 percent in the South* and *decreased 32 percent in the North.*

"The *number of wage earners* in the *furniture industry increased 18 percent in 6 southern States* and *decreased 38 percent in 12 northern States.* Value added by manufacture decreased 43 percent in the northern States and less than 0.5 of one percent in the southern States.

"There are other branches of manufacturing that have progressed more rapidly in the South than in the North, but there are some in which, during the 10-year period, the industrial trend was not as favorable in the South as in the North. These include the manufacture of morticians' goods, certain flavoring extracts and sirups, and flour and grain-mill products (Report, pp. 621-22, R. 236-237).

* * * * * * * * *

"A witness for the southern interests was the editor of an industrial publication devoted to the cause of industrial development of the South and Southwest. Excerpts from copies of this publication in 1940, contain a *statement by the southern governors that, 'In two years the volume of the South's manufactured products has increased approximately 35 percent* and is now 2½ times the value of its agriculture output; during the same period the *number of manufacturing plants in the South increased by 803 as*

contrasted to a decline in the rest of the United States of 3120.' The publication contains *many pages listing new industries that have located in the South, some of which are the largest in the country.* They include plants manufacturing cigarettes, textiles, footwear, household furniture, paints, stoves, ranges, water heaters, tin cans, clothing, vegetables, drugs and medicines, flour, optical goods, and fluorescent lamps" (Report, p. 622, R. 237). (Italics added.)

Attention is particularly directed to the finding on page 622 (R. 237):

> "No specific instance was proved where an industry was not established in the South because of the class-rate level."

Even this finding, however, does not tell the whole story of the evidence because it was affirmatively testified by witnesses who had had experience in locating industries that they had not been deterred from locating plants in the South because of the differences in the class-rate levels (R. 3151, 3809-98, 4179-89, 4785-86). This disposes of the Commission's apparent attempt to minimize the finding just quoted by the remark:

> "However, in the nature of things this fact would be difficult to prove because of the many factors entering into the location of an industry."

Moreover, it must be recalled that while the Southern Governors were with one breath proclaiming to the world the great industrial progress of the South and in the next trying to create the impression before the Commission that the difference in the class rate levels has prevented this very progress, there are important interests in the South itself who agree with the former but oppose the latter activity of the governors. Thus, the Commission reports (p. 615, R. 230):

> "Several industrial organizations and groups of shippers in the South, such as the Southern States

Industrial Council, the Southeastern Shippers' Conference, and the New Orleans Joint Traffic Bureau, opposed pleas for uniformity of class rates on the eastern basis. They expressed the opinion that the present rate structure within the South, and between the South and other territories, has proven generally satisfactory and that the reductions in class rates sought by the Southern Governors' Conference would result in substantial railroad revenue losses, which would require, as an offset, increases in southern commodity rates that would seriously injure southern industry."

The state of the record on this vital point is aptly described by Commissioner Porter in his dissent, where he said (p. 722, R. 337):

"An unbiased consideration of the foregoing data, together with others of similar import upon this record, can lead to but one conclusion, namely, that *the class-rate adjustment here before us has had no appreciable effect, one way or the other, upon the industrial or economic development of the South or the West, and that not a single shipper, nor any particular class of shippers, nor any particular territory, has suffered injury by reason of that adjustment.* Accordingly, I can find in this record no adequate support for the majority findings of undue prejudice and preference." (Italics added.)

Similarly, Commissioner Barnard remarked (p. 728, R. 343):

"I am unable to find in this record sufficient evidence to support the claim of the Southern Governors' Conference that the class rate structures within the South and between the South and official territory have restricted the industrial growth of the South and have favored and stimulated the growth of industry in the North. On the contrary, *the evidence shows that the South has progressed industrially during the last decade much more rapidly than any other section of the country.* Furthermore, the evidence fails to

> convince me that the products of the South cannot compete with the products of official territory in that territory, but for the purpose of the argument, let it be assumed that the contrary is true. Nevertheless, if true, it does not come about because of the difference in the class rates but is due to other causes which have no connection whatever with these rates." (Italics added.)

In view of this state of the record and of the Commission's findings as to the proof on this matter, its ultimate finding 3 (p. 701, R. 316) that the relationship between the class rates in the several territories

> "subjects southern, southwestern, and western trunk-line territories as a whole and the shippers and receivers of freight located therein to undue and unreasonable prejudice and disadvantage, in violation of section 3 (1) of the act"

is plainly arbitrary and unjustified, if substantial injury and benefit are essentials of such a finding.

D. If portions of the Commission's reports are to be interpreted as constituting a finding that the class rates in Official territory and those for transportation from other territories into Official territory are controlled by similar circumstances and conditions, such a finding is arbitrary, contrary to the evidence, and inconsistent with other statements or findings made by the Commission.

It must first be again recalled that both the class rates within Official territory and the existing class rates from Southern and Western territories into Official territory were prescribed by the Commission, itself, after extensive investigations and on the basis of evidence pertinent thereto (pp. 516 *et seq.*). Therefore, there is certainly a strong presumption that the fact that the levels of the rates are different is due to the existence of different circumstances and conditions affecting the class rates in Official terri-

tory and the other territories. This is clearly shown by the quotations from the reports of the Commission in the proceedings in which these different class rate scales were prescribed, which are set out earlier in this brief, *Eastern Class Rate Investigation,* 164 I. C. C. 314, 391; *Western Trunk-Line Class Rates,* 164 I. C. C. 1; *Western Trunk-Line Class Rates,* 204 I. C. C. 659, 660.

There is no finding and no evidence that there have been such changes in conditions that these differences affecting the levels of the class rates in the several territories have been eliminated, and that the class rates are now charged in all territories under substantially similar circumstances and conditions.

The lower court plainly recognized the inadequacy of the proof of injury and disadvantage and the lack of evidence as to similarity of conditions but upheld the Commission's action, evidently upon the ground that the amendment of Section 3 (1) of the Act by the Transportation Act, 1940 and the Ramspeck Resolution rendered such findings and proof no longer essential in a proceeding involving alleged undue prejudice and preference as between rate territories. The Commission apparently was also of the same view, which seems to have been largely responsible for its ultimate determination and orders. This then leads to consideration of the 1940 legislation and whether it accomplished a change in the substance of Section 3 and the essentials of undue prejudice and preference thereunder.

POINT III

The Court below and the Commission erred in concluding that the amendment to Section 3 (1) of the Interstate Commerce Act by the Transportation Act, 1940 coupled with Section 5 (b) to the latter Act so changed the law as to require and sustain the Commission's decision and orders.

By the Transportation Act of 1940, paragraph 3 (1) of the Interstate Commerce Act prohibiting undue prejudice and preference was amended simply by the addition of "region, district, territory" to the list of persons or things not to be unduly prejudiced or preferred. As a result, that section was made to prohibit undue or unreasonable prejudice or disadvantage and undue or unreasonable preference or advantage

> "to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, * * *"

By the same Act, Congress adopted the so-called Ramspeck Resolution, which was paragraph 5 (b) of the Interstate Commerce Act, 1940 and read as follows:

> "The Interstate Commerce Commission is authorized and directed to institute an investigation into the rates on manufactured products, agricultural commodities, and raw materials, between points in one classification territory and points in another such territory, and into like rates within any of such territories, maintained by common carriers by rail or water subject to part I of the Interstate Commerce Act, as amended, for the purpose of determining whether said rates are unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist: *Provided,* That the Commission in its discretion may

confine its investigation to such manufactured products, agricultural commodities, and raw materials, and the rates thereon as shippers thereof may specifically request be included in such investigation."

These two measures have occupied an important part in the discussion in the Commission's report and in the opinion of the lower court.

The reasoning of the lower court is altogether confusing. At one point it says (R. 1431):

> "It does not appear that the Commission has herein acted upon any assumption that the 1940 changes altered the basic principles governing its action."

It then proceeds to a discussion of what it conceives to be the grounds of the Commission's decision, which plainly imply a conception on the part of the Commission that the law had somehow been changed to justify it in finding rates unlawful if upon different levels although they would not have been unlawful under the Act as it previously existed, and the court concludes (R. 1433):

> "in our opinion Par. 3(1) now empowers the Commission to find such rates unlawful even though they would have been lawful in the light of all relevant considerations before the amendment. We may, indeed, take it for granted that they were lawful previous to the amendment since they had been in the main the result of comparatively recent investigations and orders of the Commission."

It was the impression of the lower court as to the Commission's action (R. 1431):

> "that in determining the existence of discriminatory rates it has construed the changes in the statute to mean that where it is found that class rates are different in the different territories, and interterritorially, and those differences cannot be justified under recognized principles of rate making by proof of sufficient differences in costs of transportation, com-

position and amount of traffic, competition by common carriers other than railroads, and the like, those rates may be found unjustly preferential or prejudicial because unduly discriminatory and consequently unlawful as between regions, districts and territories."

The court expressed the view "that this interpretation of Par. 3(1) of the Act as amended is supported by the legislative history."

At page 688 of its report (R. 303) under the heading "*Recent Amendments of the Act*", the Commission said:

> "While the rates in issue in this proceeding are to be tested by all pertinent provisions of the act, it is important to give particular attention to certain amendatory legislation which Congress has recently enacted."

The addition of the words "region, district, territory" to Section 3 (1) and the Ramspeck amendment are then referred to. The Commission stated that it had advised Congress that "it might consider the instant proceeding as an investigation under its special legislation" (p. 689, R. 304). Then having asked itself the question whether "these amendments to the act added any new inhibitions against discrimination or enlarged the power of the Commission over this subject?", the Commission, after several pages of discussion, concluded (p. 692, R. 307):

> "it is clear that the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony, and uniformity in the different regional or territorial rate structures of the country. The method employed to accomplish this purpose is equally plain. By the amendment to the substantive antidiscrimination provisions of section 3 (1) all discriminations in the form of undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, as between regions, districts, or territories, viewed as separate

entities, were brought directly within the purview of the act along with all the other inhibitions previously included. We were then authorized and directed by the other provisions mentioned to remove any such discriminations found to exist in a proper proceeding. This means that such discriminations as those mentioned which result from differences in the methods of distributing the general rate burden in the several rate-making territories, or from any other cause, if not justified upon proper consideration of recognized elements of rate making applied in the light of the amended *law are unlawful and should be corrected.*"

It is plain, therefore, that the majority of the Commission were of the view that the amendment to Section 3(1) and the Ramspeck Resolution constituted a Congressional mandate to the Commission in this proceeding to prescribe uniform rates. They have regarded the substantive law as so changed that rates on different levels in different territories are *prima facie* unlawful, and that, unless the burden should be sustained of proving differences in costs of transportation or other facts commensurate with the differences in levels as between territories, highly remunerative rates become unlawful merely because lower than rates in other territories.

It is submitted that both the Commission and the lower court were in error in their view of the effect of the 1940 legislation upon the Act and the lawfulness of railroad freight rates thereunder.

As to Section 1 (4) and (5) (a), the conception of the law upon which the Commission predicated its order would mean that the rates in one territory must be held in excess of reasonable maximum rates if higher than those in another territory and that the rates in the latter must be held to be less than reasonable minimum rates because lower than the rates in the former. As to Section 3, the argument would be that, contrary to the long accepted interpretation, discrimination means difference,

without more. The Commission says (p. 691, R. 306):

> "Considering the breadth of the language used in the amendments here under consideration, the evils sought to be cured by this legislation, the history of the times when the law was amended, as well as the statements of the legislators as to the purposes of the amendments—all proper aids of statutory interpretation—it is clear that the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony, and uniformity in the different regional or territorial rate structures of the country."

The words of the 1940 legislation plainly do not warrant any such conclusions. No change was made in Section 1 or in any definition of maximum or minimum reasonable rates. As for Section 3, the only change was the addition of the words "region, district, territory" to the list of parties or interests as between whom undue preference and prejudice are prohibited. There is no other verbal change such as would be necessary to alter the concept of undue prejudice and preference or the requirements essential to a finding thereof. Certainly this is so as to all of the parties or interests previously listed in Section 3 (1), such as persons, companies, firms, corporations, associations, localities or ports. In other words, there is no reason to believe from this amendment that the proof and preliminary findings essential to an ultimate finding of undue prejudice and preference as between corporations, localities or ports were changed in any way by the addition of "region, district, territory" to the list. On the contrary, the very fact that these three terms were added to the list can mean only that a finding of undue prejudice and preference as between them must be supported by the same kind of preliminary findings and proof as are necessary for a finding of undue prejudice and preference between persons, localities or ports. The circumstances indicating injury and

prejudice, may, of course, differ, just as they differ between a case involving individual shippers and in a case of discrimination between localities or port districts. But there is no reason to conclude that findings of substantial injury and benefit and of similar circumstances and conditions are any less requisite to an ultimate finding of a violation of Section 3(1) where regions, districts or territories are concerned than in a case involving individual shippers, localities or ports.

As for Section 5(b) of the Transportation Act, 1940, this was in no sense an amendment to the substantive law but was merely an authorization and direction to the Commission to conduct an investigation.

The conclusion is inescapable that those comprising the majority of the Commission in interpreting these provisions of the 1940 Act were led to give effect rather to what they conceived to be the purpose of the agitators for uniformity than to the language of the legislation and the intention of Congress as indicated thereby. Thus, after asking whether the 1940 legislation changed the substantive law and enlarged its power, the Commission said that "in seeking an answer to this question it is pertinent and helpful to review briefly the legislative background of these amendments." (p. 689, R. 304). It included in its report certain excerpts from the Congressional debates and reached its conclusion as to the effects of the amendments by considering, as it said among other things, "the history of the times when the law was amended, as well as the statements of the legislators as to the purpose of the amendments."

It is perhaps not strange that the majority have been thus influenced. Assuming, as the majority report states, that they have given heed to "the history of the times" and "the statements of the legislators", they have of course noted the statement of a Congressman quoted

earlier in this brief. On the other hand, the excerpts from the Congressional debates quoted in the footnote on page 691 of the report (R. 306) hardly present a complete or fair report of the views expressed by members of Congress regarding the purposes of the amendments. For some reason the Commission in this footnote quotes only the remarks which appear to lend support to the majority's interpretation of the amendments and are responsive to the wave of agitation in the South.

In a brief being filed by other appellants herein, the history of the 1940 legislation will be reviewed and examined more at length. It will therefore suffice here to cite only a few matters indicating that the Commission was led to a misconception of the effect of the legislation by confusing the remarks of the agitators with what Congress really did.

That many things were being done at that time to appease the agitators of the South is apparent in the following comments when the bill embracing the amendments was debated in the Senate on May 22, 1939 (Congressional Record, p. 5889, vol. 84, part 6):

> "Mr. Wheeler: I also wish to call the attention of the Senator from Texas to something which the Senator from Alabama already knows, that recently the President of the United States appointed a new Interstate Commerce Commissioner. He is the author of a study on freight-rate discriminations. The State of Alabama now has two Commissioners on the Interstate Commerce Commission, and both of them are there, as I understand, because of the request and suggestion of the Senator from Alabama. I congratulate the Senator upon the influence he now has, and I am sure that with these two added Commissioners from Alabama—
>
> "Mr. Hill: And one from Texas.
>
> "Mr. Wheeler: I am not sure that there are not two from Texas.

"Mr. Connally: That would be cause for comment.
"Mr. Wheeler: Yes. Unquestionably this matter will be straightened out."

However, the majority's footnote makes no reference to the statement of Representative Halleck, reported in the Congressional Record, page 9712, Vol. 84, Part 9, 76th Congress, 1st Session, where he said:

"Something has been said about the alleged freight rate differentials of the South. I sat through all those hearings and heard the claims of the people who came there. I submit on the record of the hearings that when we finally got through with them the most they asked was some extension of the anti-discrimination provisions of the Interstate Commerce Act to apply to regions and sections. We wrote that in the bill. In addition they asked a direction to the Interstate Commerce Commission that the Commission inquire into the alleged discriminations with a view to correcting them if any existed. That is all the people who came there asked us for, and I submit it on the record of the hearings."

Moreover, while noting that Senator Wheeler in answer to a question from one of the Southern Senators, Senator George, as to whether the amendment of Section 3(1) "will make toward the equalization of rates in the various regions'" replied, "I do not think there is any doubt about that at all, because that is the purpose of the bill; it is the intention of the bill", the Commission failed to observe that this same Senator during the debate in the Senate on May 22, 1939, in response to a question from Senator Frazier of North Dakota, said the bill "does not mean that rates are to be equalized". This statement culminated the part of the debate which is quoted below (Congressional Record, p. 5890, vol. 84, part 6):

"Mr. Frazier: Is it the expectation of the Committee that by the amendment in section 52 [now section 5(b) of the Act] the rates in the various

classification territories will be equalized or made the same in different territories?

"Mr. Wheeler: I do not think that is possible.

"Mr. Frazier: I do not see how it is possible. I was wondering what the intention was.

"Mr. Wheeler: It is not possible for a number of reasons. For example, it costs more to carry freight over the mountains in two trains than to carry it on the plains in one train. Likewise, we must recognize the fact that railroad transportation service and rates depend somewhat on the intensity of the traffic. In long stretches of territory with no traffic, shippers must pay more for railroad service than do shippers in a densely settled part of the country where traffic is plentiful and where there is much competition from busses, trucks, and things of that kind. However, it seems to me from my study of the question that apparent inequalities ought to be corrected. * * *.

"Mr. Frazier: In North Dakota we have a large volume of wheat to transport in the fall of the year, and because we have that large volume, and because our territory is practically level, we have a rather beneficial rate on wheat as compared with some other territories. Our railroad commission and traffic experts are afraid that the provision to which reference has been made will take that special rate away from us.

"Mr. Wheeler: I believe this provision will help the people of the Senator's State rather than harm them in many respects.

"Mr. Frazier: We have a much lower rate than prevails in many other sections of the country. If rates are to be equalized, it will mean raising our rates.

"Mr. Wheeler: The bill does not mean that rates are to be equalized. * * * The people of the Senator's State might just as well disabuse their minds of the fear that as a result of the bill they will lose any benefit which they now have. * * *."

It is also interesting to observe that when Senator Connally of Texas was asked by Senator Reed of Kansas

whether he would desire that the amendments be made "sufficiently strong to require the State of Texas to remove the regional distinction which it maintains by State authority within the State of Texas", he replied that he "did not mean to imply that all these regions should be done away with" (Congressional Record, p. 5889, vol. 84, part 6).

The action of the majority of the Commission in reading into the Congressional direction that it conduct an investigation, a change in the substantive law not supported by the language of the legislation, and a mandate to it to prescribe rates in conformity with the demands of the public outcry from southern spokesmen for uniformity was entirely similar to what happened twenty years before in connection with an outcry from the agrarian interests of the West. Following the first World War, there occurred a serious depression in agriculture which adversely affected the Western and Middle Western States. This brought loud complaints against the freight rates and it was charged that the freight rates discriminated against agricultural products. There was much discussion in Congress and finally Congress enacted what became known as the Hoch-Smith Joint Resolution approved January 30, 1925. This resolution provided in part:

> "That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.
>
> "That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carrier subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly dis-

criminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist.

* * * * * *

"In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: * * *."

With a view to carrying out the mandate of this resolution, the Commission instituted a number of nationwide investigations into the rates on various kinds of freight. Following these investigations, it ordered reductions in the freight rates for the transportation of various agricultural commodities and, on the ground that the Hoch-Smith Resolution had effected a change "in the basic law," it found the previously existing rates to be unreasonable. These orders came to this Court in *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, and *Atchison, T. & S. F. Ry. Co.* v. *United States;* 284 U. S. 248. The Court held that the Commission had misconstrued the effect of the Hoch-Smith Resolution and that, although directing the Commission to investigate the freight rates, it had made no change in the substantive provisions of Sections 3(1) and 15 of the Act. In the *Ann Arbor* case, the Court said (p. 666):

"The joint resolution is the outgrowth of several measures proposed in Congress but not adopted. Some of the measures may have been designed by

their proposers to make real changes in existing laws relating to transportation rates. But they are not before us. The measure that is before us is the joint resolution which emerged from the legislative deliberations and proceedings. It is brought here to the end that we may determine its proper construction, which of course is to be done by applying to it the rules applicable to legislation in general.

"The question presented is whether the resolution changes the substantive provisions of existing laws relating to transportation rates, and particularly whether rates which would be lawful under those laws are made unlawful by it."

In regard to the third paragraph which the Commission had construed as making a change "in the basic law," the Court stated at pages 667 and 668:

"The third paragraph was construed by the commission as making a change 'in the basic law' as placing agricultural products in a 'most favored' class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding most of the carriers 'have not as yet made the fair return' for which § 15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system. Indeed, it is apparent from the commission's opinion that it regarded this paragraph as requiring it to condemn the existing rates as unreasonable and unlawful, although, had they been considered independently of the paragraph, they must have been upheld as reasonable and lawful under the applicable sections 1(5) and 3(1), of the existing law.

"We are of opinion that the commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law."

The same conclusion is required here. The Commission, moved by the vocal agitation of certain spokesmen in the South, as it was by that of the farmers, has misconstrued a congressional direction to it to make an investigation as a change of the substantive law and a mandate as to the results which its "investigation" must produce, regardless of the evidence and of previously well established standards governing the administration of the Act.

It is submitted, therefore, that the Commission's orders rest upon a fundamental error of law and for this reason must be set aside.

POINT IV

The Commission's determination that the class rates are unlawful because not on a uniform level and that the class rates for transportation within official territory should be increased to approach uniformity is not supported by preliminary findings of fact or by the evidence, and the factual considerations stated by the Commission do not sustain its conclusion.

Apart from the legal misconceptions just discussed, the Court will find it difficult to deduce from the Commission's report a clear understanding of the factual basis of its ultimate conclusions and of the interim orders whose validity is here challenged. A large part of the voluminous report is devoted to discussions or descriptions of evidence and contentions with no indication as to how they have influenced the thinking of the majority upon the issues involved.

Starting from its viewpoint that the 1940 legislation changed the law and constituted a mandate to bring rates to a common level, the essence of the majority's conclusion is, of course, uniformity. There is no suggestion that if the Commission were considering the class rates for transportation within Official territory by themselves,

it would find that they violate Section 1(4) and (5)(a) because they are less than minimum reasonable rates. Certainly there is not a scintilla of evidence which would support such a conclusion. It is only in relation to the class rates within the South and West and from the South and West to Official territory that the majority of the Commission find the class rates within Official territory unlawful. They are unlawful in the Commission's view only because they are lower than the class rates in the South and West. The class rates in the South and West are in excess of maximum reasonable rates only because they are higher than the class rates within Official territory. The level of rates in each territory is made the standard of maximum and minimum lawfulness for the rates in each other territory and interterritorially.

The Commission's report gives no clear indication of the reasoning processes by which this central conclusion is arrived at from the various statements and so-called findings in the report. However, having in earlier points endeavored to show the Court that the report is lacking in preliminary findings essential to the ultimate findings made by the Commission and that the record contains no evidence to support such essential preliminary findings, we desire now to discuss the various points mentioned in the Commission's reports, in order to show that these various points either are incorrect or do not support the ultimate findings and orders. The various considerations of fact which can be deduced from the report as apparently relied upon by the Commission in support of its orders are the following:

(a) The computations of average costs of transportation.

(b) The existence of variations in the kinds of freight transported within the several territories, notwithstanding the fact that the same class rates prevail in the territories.

(c) The fact that the class rates are charged on only a very small proportion of the total traffic in the South and West and from those territories to Official territory.

(d) The fact that the average rate of return of the railroads in Official territory has been slightly less in recent years than the corresponding average figures for the railroads in the South and West.

A. The Commission's findings as to average cost of transportation and the evidence on this subject do not support the decision and orders.

The Commission's report leaves no doubt that the majority has attempted to find color of support for its decision in the evidence as to relative average costs of transportation in the several territories. This is indicated by the extended discussion of the matter of costs at pages 571 to 591 (R. 186-206) of the report and again at pages 692 to 694 (R. 307-309). It is shown by its conclusion at page 694 (R. 309): "Applying the foregoing principles to the issues in this proceeding, there is no doubt that, based on cost of service considerations, the differences in levels, schemes, and progressions of scales that at present occur in the several territorial class-rate structures here under review are not justified."

Commissioner Porter remarked, at page 717 (R. 332): "One is required to guess from the text of the report the reasons which impelled the majority to prescribe a uniform scale of rates throughout this area, because the basis or bases for this finding are not clearly stated. The emphasis placed upon it in the report indicates that the cost evidence is the principal basis for the finding."

Commissioner Barnard similarly said: "The only ground that I can conceive which impels the majority to condemn the class rates prescribed in the class-rate scales is the cost evidence prepared by members of our staff" (p. 728, R. 343).

The evidence as to the relative costs of transportation in the several territories consists of the testimony and exhibits of Dr. Ford K. Edwards, the Commission's chief cost analyst, the testimony and exhibits of various railroad statisticians criticizing Dr. Edwards' methods and figures and also the testimony and exhibits of Charles E. Bell, a railroad analyst and statistician of great experience and distinguished standing, retained by the State of New York. The testimony of Dr. Edwards will be found at the following pages of the record: R. 1553-1647, 1657-1665, 1728-1730, 1738-1750, 3505-3531, 4348-4395, 4853-4857. His exhibits are exhibits 2 to 4 inclusive, (R. 5139, 5141, 5423); exhibits 10 to 13 inclusive, (R. 5652, 5678, 5744, 5910); exhibit 195 (R. 11 257); exhibit 196 (R. 11 367). The testimony and exhibits of Dr. Edwards and Mr. Bell will be referred to more particularly in the discussion to follow.

The computations which the majority have accepted and employed are those of Dr. Edwards and the Commission has plainly rejected the criticisms made by other witnesses with regard to Dr. Edwards' methods and the conclusions to be derived therefrom. It is therefore necessary to examine Dr. Edwards' testimony and exhibits very briefly to see what his computations are and what they are not.

Cost accounting is a complicated business. Especially is this so in the case of railroads, where there are thousands of commodities transported and millions of different movements and operations which produce the total costs to be defrayed by total revenues. Cost computation, as the term is employed in this connection and has been used throughout this proceeding, consists not really in an ascertainment of actual costs of particular movements or railroad operations, but rather in the apportionment as between hypothetical movements of the many items of total expense which the railroads incur and which

appear upon their books, kept in accordance with the accounting regulations prescribed by the Commission. These apportionments and the method to be employed in making them involve the exercise of judgment. It may not be the function of the Court to substitute its opinion for that of the Commission as to which method of apportionment is most likely to produce a figure of the character sought. It is the function of the Court, however, to inform itself of obvious errors in the method employed, which are bound to distort the results of the computations, and also to examine the Commission's use of the computations and the conclusions which it bases thereon to see whether the computations which the Commission has elected to accept are of such a sort as to support the inferences or findings of fact which the Commission has attempted to predicate thereon.

The first point in this connection is that while the Commission's orders herein relate only to class rates and that it is only in so far, if at all, as Dr. Edwards' computations indicate the relative costs of transporting class rate freight that the computations afford any proof whatsoever bearing upon the issues to be determined by the Commission, nevertheless *Dr. Edwards' studies do not indicate and did not purport to indicate the cost of handling freight transported at class rates.* This is the first reason why there is no evidentiary support in the record for the Commission's findings as to costs of transportation as a basis for its conclusion that the class rates should be on a uniform level and are unlawful to the extent that they are not uniform.

Moreover, the most that Dr. Edwards himself claimed for his computations is that from them one can obtain a figure supposed to represent the average of the total expenses of the railroads in Official territory allocated to the movement of a certain tonnage of freight in a certain type of car for a certain distance, regardless of the kind

of freight or the freight rates paid thereon, and a corresponding figure for the same weight of freight in the same kind of car for the same distance in the South or in the West. The figure would be the same whether the freight moved at class rates or commodity rates. It would be the same regardless of the classification rating of the freight.

Therefore, where different freight rates are charged for the transportation of different kinds of freight having the same weight and loading per car, Dr. Edwards' computations would indicate nothing more than the average revenue which all shipments of all of these commodities for a given distance must produce. Since the rate structures in two territories are radically different, Dr. Edwards' computations would afford no indication whatever as to how the rates for the transportation of a group of commodities in one territory should compare with the rates for the transportation of the same commodities in another territory. The point can be illustrated by an example taken from one of Dr. Edwards' exhibits and from his testimony with reference thereto. Thus, in one of his computations, embodied in his Exhibit 2, at page 24 thereof, Dr. Edwards has computed a figure of 11.8 cents per 100 pounds as representing the average cost (cost level II, embracing carload operating expenses, rents and taxes) for the transportation of 24.6 tons of freight in a box car for 300 miles in Eastern territory, excluding Pocahontas. Using this figure as illustrative of what his computations were intended to show, Dr. Edwards was examined and testified as follows:

> "Q. In order that we may be sure that we understand the conclusion to be drawn from the figures which are there shown, and from similar figures in the other table, I would like to ask you this question: assuming the correctness of your computations, and the method employed, is it the correct conclusion to be drawn from table 2 that if, looking for example at line 2, the average revenue per ton of all railroads in

Eastern territory, excluding New England and Northern Illinois, from freight handled by them in box cars for an average distance of 300 miles and an average loading of 24.6 tons, is 11.8 cents per hundred pounds, then the railroads have earned their costs on the basis of cost level No. 2?

A. That is true, Mr. McCollester, based on our first cost study put in.

Q. (By Mr. McCollester.) Now, if it should so happen, Dr. Edwards, that of freight having that average haul and that average loading per car in Eastern territory, some freight should produce revenue less than 11.8 cents per hundred pounds and other freight should produce revenue in excess of 11.8 cents per hundred pounds, the railroads would earn their costs, under cost level No. 2, if the average came out to be 11.8 cents per hundred pounds; is that correct?

A. Yes.

Q. Therefore, would you not agree, Doctor, that if it should appear that the average costs so computed for that length of haul and that loading in one section of the country were the same as in another, and that some freight in one territory yielded lower revenue than in another territory, while other freight yielded a higher revenue, the fact that the costs were equal would not indicate that all of the rates would have to be equalized, on all classes of traffic, in order to yield cost, would it?

A. That is right. There might be a different distribution of the transportation burden, as between different commodities in different territories.

Q. And that is in effect what you mean, is it not, when you say, in a somewhat different connection, I believe on page 3 of your Exhibit No. 2, that if some service pays less, other service must pay more?

A. Yes" (R. 3520, 3521).

In his Exhibits 10 to 13 (R. 5652-5910), Dr. Edwards presented various other computations and figures of so-called costs, the resulting figures reflecting certain modifications in his methods and in the estimates which he employed. However, an examination of the evidence

will certainly show that all of the figures computed and submitted as costs were of the same essential character, namely, averages of allocations of total expenses for freight of a certain loading per car moving in a certain type of car for a given distance without regard to the kind of freight or the nature or amount of the freight rate charged thereon. The Commission's description of the cost studies at pages 571 to 591 (R. 186-206) makes this clear. At page 575 (R. 190) it is stated:

> "Territorial cost comparisons were based on the cost of furnishing a given amount of transportation service in the respective territories, taking into consideration every kind of traffic carried, whether handled in box, gondola, tank, stock, flat, or refrigerator cars, and covering 300 miles of haul."

On page 573 (R. 188), it was said:

> "The cost study gave no consideration to differences in the ability to pay of the various kinds of traffic handled in each territory, this being viewed as an element for consideration separate and apart from costs."

It is in the use of the computations and the deductions and conclusions derived therefrom that the majority of the Commission acted entirely arbitrarily and contrary to their own description and to Dr. Edwards' testimony as to what the cost computations disclosed.

In the summary on page 591 (R. 206), the majority of the Commission state:

> "The various comparisons of territorial costs reviewed hereinabove show that there is little significant difference in the cost of furnishing transportation in the South as compared to the East, excluding the Pocahontas territory."

On page 694 (R. 309), the majority conclude:

> "Applying the foregoing principles to the issues in this proceeding, there is no doubt that, based on

cost of service considerations, the differences in levels, schemes, and progressions of scales that at present occur in the several territorial class-rate structures here under review are not justified."

Here is where the majority of the Commission have plainly gone astray. The evidence shows and the Commission finds that there is a wide variation in the kinds and quantities of freight transported in the several territories. More than this, and even more important for this particular point, is the fact that the railroads in the several territories have radically different rate structures, as the result of which the transportation of different kinds of freight is expected to contribute in different ratios or proportions to the total expense of maintaining transportation systems. The record shows and the Commission finds, for example, that although the class rates are on a lower level in Official territory than in the South, there are commodity and exception rates in the South on the same freight which moves at class rates in Official territory which are as low as or lower than the latter. And the evidence shows, also, that in the South there are many commodity rates on raw materials and low-grade freight that are very much lower than the rates charged for the transportation of the same commodities by the railroads in Official territory (pp. 593-600, R. 208-215). For example, the rate for the transportation of pig iron from Pittsburgh to Buffalo, for 232 miles, is $3.61 a long ton. The rate for the transportation of pig iron from Birmingham, Ala. to Macon, Ga., for 247 miles is only $2.61. Assuming that 25 tons of pig iron were transported in a box car, in each instance Dr. Edwards' computation would produce a figure referred to by the majority as "cost". This figure would, however, be the same in each instance as if the commodity in the box car had consisted of 25 tons of high-grade machinery, charged fourth class rates. The fact that Dr. Edwards' computed figure for the

northern movement might be approximately the same as that for the southern movement, no more proves that the freight rates on machinery are unlawful because the northern rate is lower than the southern rate than it proves that the freight rates on pig iron are unlawful because the northern rate is higher than the southern rate. In other words, so long as the rate structures are different in the two territories, an approximate equality of average cost figures proves nothing as to what the relative levels of the rates on particular commodities or groups of freight should be in the different territories.

The Commission has itself frequently held that computations of average costs cannot be accepted as proof as to what individual rates or groups of rates should be.

In the *Western Trunk-Line Class Rates*, 164 I. C. C. 1, at page 188, the Commission said:

> "We are not willing to assume that average unit line-haul costs on all traffic represent line-haul costs on class traffic * * *."

The Commission made also the following remark, previously quoted, which is especially pertinent here:

> "Class rates in w.t.l. territory appreciably higher than in official territory are justified also by the nature and volume of the articles moving under such rates in the respective territories. Many articles handled in enormous volume pay class rates in official territory, whereas in w.t.l. and southern territories they enjoy commodity rates lower than the corresponding class rates. *This in a large measure will account for and warrant relatively low class rates in official territory as compared with other territories. It is particularly pertinent in connection with the endeavor of certain interests to show that the average cost of all traffic in w.t.l. territory is not much, if any, above that in official territory.*" (Italics added.)

In *Commonwealth of Kentucky* v. *Ahnapee & W. Ry. Co.*, 213 I. C. C. 297, the Commission, at page 308, said:

> "In 1929, the year on which the figures are based, 78 percent of the traffic of the Louisville & Nashville consisted of products of mines and of forests, which are affected by their own peculiar transportation conditions. Only 13 percent of its traffic consisted of products of manufacturers, which require a much different service than coal and lumber. The Pennsylvania, on the other hand, derived only 64 percent of its tonnage from products of mines and forests, and manufactured articles accounted for about 28 percent of its total. *These differences cast doubt on the validity of average costs as an index to the comparative cost of handling class-rate traffic or to the proper level of such rates and indicate that comparatively little weight should be given to such costs in determining the proper level of class rates.*" (Italics added.)

The Commission's report here gives no indication why computations of average costs afford any more evidence as to the cost of handling or the proper level of class rates now than they did when the case last cited was decided.

In *Calif. Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I. C. C. 25, the Commission, referring to the cost studies before it in that proceeding, said (p. 52):

> "If these are accepted, the deciduous-fruit traffic is carried at a loss. *They are based on the average cost of handling all traffic, and can not be accepted as showing the cost of the deciduous-fruit tonnage. Nor. Pacific Ry Co.* v. *Dept. Public Works*, 268 U. S. 39." (Italics ours.)

In *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39, Mr. Justice Brandeis, writing for the Court, said (pp. 43-44):

> "The Department's findings concerning operating costs rested largely upon deductions from data found

in published reports of the carriers and in their exhibits filed in this case. Instead of attempting to show by evidence, reasonably specific and direct, what the actual operating cost of this traffic was to the several carriers, the Department created a composite figure representing the weighted average operating cost per 1,000 gross ton miles of all revenue freight carried on the four systems and made that figure a basis for estimating the operating cost of the log traffic in Washington. This was clearly erroneous.

"A precise issue was the cost on each railroad of transporting logs in carload lots in western Washington, the average haul on each system being not more than 32 miles. In using the above composite figure in the determination of this issue, the Department necessarily ignored, in the first place, the differences in the average unit cost on the several systems; and then the differences on each in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation is conducted. In this unit cost figure no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul; in the character of the commodity; in the configuration of the country; in the density of the traffic; in the daily loaded car movement; in the extent of the empty car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditures required for its maintenance. Main line and branch line freight, interstate and intrastate, car load and less than car load, are counted alike. The Department's error was fundamental in its nature. The use of this factor in computing the operating costs of the log traffic vitiated the whole process of reasoning by which the Department reached its conclusion."

See also *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 380.

Commissioner Porter in his dissenting opinion effectively pointed out the unwarranted and arbitrary nature

of the Commission's action in basing its decision upon cost computations when he said, among other things (p. 717, R. 332):

> "The cost evidence was prepared by members of our staff. It does not even purport to reflect the actual or relative costs of transporting class-rate traffic in the different rate territories. The territorial cost comparisons were based on the cost of furnishing a given amount of transportation service in certain territories selected by our cost section on traffic handled in different types of equipment, such as box, gondola, tank, stock, flat, or refrigerator cars. Class-rate traffic is not transported exclusively in any type of equipment, and although a substantial quantity is moved in boxcars the volume of class-rate traffic transported in boxcars is much less than the volume of traffic transported in that type of equipment at exception or commodity rates. It is thus clear that the cost evidence does not afford a basis for a finding of the actual or relative costs of class-rate traffic in the various territories."

The misuse by the majority of the cost computations and the error and injustice produced by the principal reliance which they have placed thereon is emphasized when the real character of the cost computations themselves is further analyzed and the weaknesses and fallacies therein are considered. It is submitted that other features of the cost computations place them beyond the limits within which the Commission's judgment upon the evidence should be accepted by the Court.

First, the computations themselves of necessity involved assumptions and estimates whose validity is seriously open to question. They are so much the results of approximation that we submit the results cannot properly be made the basis of a drastic order requiring an increase of many millions in the freight charges to be paid by the shippers in Official territory. On this feature

of the computations, Commissioner Porter said (p. 717, R. 332):

> "The report does not show, except in nebulous fashion, that the cost figures represent apportionment of totals, based on estimates; that they involve many assumptions and acts of judgment; and are not computations from direct, original cost figures for particular movements. These, however, are the facts. It omits evidence showing that 59 out of 117 items of basic data used in the studies were estimated, and that 458 out of 500 sequences were wholly or partly estimated. It fails to disclose clearly that when making the studies it was assumed that the consist of the traffic is the same in the different territories, when the fact is, as I have pointed out, that the traffic consist differs widely in the respective territories. The result is that theoretical costs are produced, based upon assumptions which are not facts, and upon comparisons of unlike things."

Second, the computations of costs cannot be matched with the rates prescribed or when so matched do not support the Commission's ultimate findings. It seems obvious that to be pertinent to a determination as to rates, the average cost figures relied upon should be averages for the same railroads or groups of railroads for which rates are prescribed. Here the order attempts to bring about an increase in the class rates for all railroads in Official territory and a reduction for all railroads in Southern territory on the basis of ultimate findings that the class rates for each territory as a whole are unjust and unreasonable and are unduly preferential and prejudicial. To the extent, if at all, that computations of average costs would be relevant to such ultimate findings, it seems plain that they would have to be averages for all railroads in each territory affected by the orders.

Dr. Edwards, however, in his initial computations did not group the railroads whose statistics he averaged in accordance with the rate groups. Instead, he excluded from the statistics for Official territory those of the so-

called Pocahontas Lines. His explanation was that the traffic of the Pocahontas Lines is so predominantly coal that their statistics should be separated from those of other railroads. However, the Pocahontas lines traverse Official territory and they charge Official territory class rates. The Commission's orders would require a 10 per cent increase in their class rates. Moreover, the evidence shows that there is no such difference between the Pocahontas lines and other important railroads in Official territory in the matter of the proportions of coal traffic to total business as obtain between some of the railroads which are included in the Southern group for the computation of average costs for that territory (R. 3732-3734; Exhibits 166, R. 10454, 225-27, R. 11829, 11831, 11832).

The matter is important in view of the weight which the Commission in its report has attached to comparisons of average costs, as indicated by its conclusion on page 694, that

> "based on cost service considerations, the differences in levels, schemes, and progressions of scales that at present occur in the several territorial class-rate structures here under review are not justified"

and in view of its finding on page 591 (R. 206) that it is only if Pocahontas territory is excluded

> "that there is little significant difference in the cost of furnishing transportation in the South as compared to the East."

The exhibits show and the Commission correctly finds on page 591 (R. 206) that

> "If the Pocahontas territory is included with the East, the costs for the South, based on the year 1939, are between 3 and 6 per cent above those for the East."

It may be remarked further, that since the class rates in a large part of New England are differentially higher

than the class rates elsewhere in Official territory, the correct comparison, especially in the case of the appellant States, would be of the average costs of transportation for all lines in Official territory other than New England with the averages for the railroads in the South. No such figure has been computed by Dr. Edwards, but since the costs for New England are somewhat higher than those for the rest of Official territory, it is plain that the average of the costs for Official territory other than New England would be more than 3 to 6 per cent lower than the average costs for the South.

In the third place, the Commission's orders require a 10 per cent increase in the class rates in Official territory for the purpose of equalizing them, not only with the class rates in the South but also with the class rates in the West. However, if costs are to be a standard, the Commission's own findings as well as the evidence require that the class rates in Official territory should be substantially lower than those in the West. The majority of the Commission make no finding whatever that there is even approximate equality of costs between Official territory and the West. On the contrary, they find, at page 591 (R. 206), that if Pocahontas territory is included in Official territory, the average costs for Official territory, based upon the period 1930 to 1939, were 18 per cent lower than those in the West. Certainly with this difference it cannot be said that the evidence as to costs justifies a finding that the rates in Official territory are unlawful because not uniform with those in the West.

We will not burden the Court with criticisms of the details of the methods of computation, some of which are summarized by the Commission in its report. One further feature of the computations should, however, be brought to the Court's attention as an additional indication of the arbitrary character of the Commission's orders in so far as they purport to be predicated upon the cost

figures. This is the fact that the average computed figures which are presented as those for Southern territory reflect the results of favorable railroad operations which are actually performed in Official territory. The reason why this is so is that the Louisville & Nashville and Illinois Central are grouped as Southern railroads for accounting purposes and their figures are included in the Southern averages (R. 3754-3760, Exhibit 166, part 1, R. 10454). But their relatively low costs, which bring down the Southern averages, are due to the transportation of coal, a large part of which takes place over their lines in Official territory (R. 3760-3765). Dr. Edwards made some adjustments for this fact but was not able to obtain all figures necessary to separate the operations of these lines in Official territory from the balance in Southern territory. Consequently it is fair to assume that the figures which are presented as the average computed costs for Southern territory are really lower than the actual average costs for transportation over the lines on which the Southern class rates are charged. Similarly the averages for Official territory do not have the benefit of the lower figures which would doubtless be produced by the inclusion therein of the statistics relating to transportation performed by these railroads in Official territory.

In short, it is submitted that neither the majority's discussion of the evidence as to average costs nor the evidence itself in any way supports the ultimate finding that the class rates are unlawful because not uniform. Even less, if that be possible, do they sustain the requirement that the class rates in Official territory be increased.

B. The fact that there are differences in the kinds of freight transported within the several territories does not support the Commission's orders. On the contrary, the evidence as to so-called "consists" of traffic in the several territories precludes an ultimate finding that the class rates are unlawful because not uniform.

On page 694 (R. 309), the majority of the Commission say:

> "When analyzed in detail there are many more differences in the consists of traffic in these respective territories than when basic commodity groups, such as those used by us in the compilation of traffic statistics, are considered."

The majority concluded (p. 695, R. 310):

> "When analyzed in this light, the differences that exist in the consists of traffic in these respective territories are not so substantial or of such character as to warrant the present differences in class rates.
>
> "The record discloses that the class rates are substantially higher in southern, southwestern, and western trunk-line territories than in official territory, and that the interterritorial class rates between official and the other territories are substantially higher than those in official territory. These differences have resulted in a greatly diminished use of class rates and the establishment of numerous exceptions to the classifications, together with column and commodity rates, on a lower level than class rates. The great preponderance of traffic now moves on the exception, column, and commodity rates."

The view of the majority appears to be that since a single basis of class rates is in effect throughout each rate territory, notwithstanding the fact that many different kinds of freight are transported within the territory, therefore there should be uniformity of class rates throughout all territories.

The first answer to this suggestion is that in each territory the class rates are a part of a scheme of rates made up of class, commodity, and exception rates, prevailing generally throughout that territory, but that these schemes differ radically as between territories. The Commission's argument would be valid only if there were involved a unification of all rates—commodity, exception, and class rates—throughout all territories.

The second answer to the suggestion is that it is based upon incorrect premises, contrary to the evidence. On pages 611 and 612 of the report (R. 226, 227), the Commission presents tables showing the broad categories into which freight has been divided in terms of the percentages of each category in the respective territories. A comparison of the percentages, however, is no indication whatever as to the different kinds of freight and particularly as to the different volumes of freight making up the traffic in each territory. Any assumption of similarity of traffic or possible traffic as between the several territories which inevitably affect the rate structures and the rates which the railroads may profitably charge is disposed of by the Commission's own findings, such as the following (p. 537, R. 152):

> "Official territory greatly outranks all other territories in the proportion of semidurable and durable commodities which constitute the more important sources of the secondary metal supply. Depending on whether Michigan and Virginia are excluded or included, official territory is estimated to contain between 60 and 62 percent of the manufacturing establishments, between 44 and 46 percent of the hotel rooms, 59 and 61 percent of the office, trade, and other business structures, 50 and 52 percent of the dwelling units, 48 and 50 percent of the motor vehicles, 56 and 58 percent of the miles of wire in cable, and 64 and 66 per cent of the miles of all wire of telephone companies. This territory is somewhat less important relatively in its secondary metal reserves represented by railway plant and equipment, which is one of the

most important sources of secondary metal. Although this territory had between 28 and 31 percent of the miles of road, it does not greatly outrank the western trunk-line territory in this respect, although very much above all three of the other rate territories. However, class I railroads of the eastern district, which roughly coincides with official territory, owned between 41 and 46 percent of steam locomotives and a majority of the steel or steel underframe passenger-train cars in 1938. These roads also owned more than half of the steel and steel underframe freight-train cars if the Pocahontas region is included with the eastern district, and nearly 47 percent if it is excluded."

Exhibit 165 shows that in 1939 the railroads in Official territory handled 961,769,420 tons of coal and coke as compared with only 208,544,676 tons handled by the railroads in the South, and in the same period the railroads in Official territory handled 482,668,076 tons of other freight as compared with but 143,766,136 tons handled by the Southern railroads. Certainly these tremendous differences in the total volume of freight, and especially in the volume of highly profitable coal and coke traffic, render it impossible to conclude that there are such similarities in the consists of freight in the several territories as to require uniformity of class rates.

One important kind of highly profitable freight is iron and steel. Exhibit 165 (R. 3780, 10398) shows that in 1940, 83.86 per cent of the total tons of iron and steel articles of the entire country originated in the appellant States and only 6.65 per cent in the South. Iron and steel tonnage handled by the railroads in the appellant States amounted to over 62,000,000 tons and comprised over 15 per cent of the total traffic handled by these railroads as compared with 7,346,000 tons handled by the Southern railroads, which constituted 5 per cent of their total traffic.

These differences are the causes not the results, of the differences in the freight rates. Thus the record shows that 90 per cent of the glass and glass containers of the country are manufactured in Pennsylvania, West Virginia, Ohio, Illinois, and Indiana and that this is due to the abundance of coal, glass-sand, limestone, and sodas available in close proximity in these states. The existence of salt, coal, hydro-electric power or gas within easy access of each other in the North and not in the South has brought about a large production of heavy chemicals in the North (R. 3749).

The catalogue of differences in the kinds and volumes of freight produced and available to the railroads in the several territories could be extended at length from the evidence of record. Suffice it to say that the evidence fully supports the comment of Commissioner Mahaffie that

> "In a country so vast as this with its widely varied resources and differing transportation needs it seems to me a mistake to try to compel general equality in rates except to the exent equality is justified by transportation conditions" (p. 708, R. 323).

C. The Commission's orders are not supported by the references to the small proportions of freight moving at class rates in the South and West and interterritorially.

As has been previously remarked, one of the most significant facts in this proceeding, which, as we contend, negatives all basis for the Commission's orders, is the meagre proportion of freight in the South and West and from the South and West to Official territory on which the class rates affected by the orders are demanded. On page 696 and elsewhere in the report, the majority endeavor to turn this fact into a ground for their ultimate

findings. They say, for example (p. 696, R. 311):

> "It is clear that the method of distribution of the rate burden between types of traffic now observed in southern, southwestern, and western trunk-line territories has resulted in rates so high that they have prevented the free movement of traffic *at the rates in issue*. This result is fully proved by the fact that numerous lower exception and commodity rates which move the great preponderance of the traffic and produce the great preponderance of the revenues in those territories, have been established." (Italics added.)

This is a most misleading and meretricious remark, in the sense in which it was evidently intended. It was perhaps hoped that the italicized words would be overlooked by the careless reader and that the impression would be conveyed that the rate structures have "resulted in rates so high that they have prevented the free movement of traffic." Of course if that were true, it would be a serious indictment of the rate structures. However, the fact that in the South and West an insignificant proportion of the freight transported moves at class rates proves nothing more than that the railroads in those territories have provided lower exception or commodity rates upon which the freight actually moves freely. Correctly construed, the statement is really nothing more than that the class rates in the South and West are merely "paper rates" and, therefore, do not result in violations of the Act since they are not *charged* because lower rates are available.

Moreover, if, as the majority would have it appear, one of the excuses for their orders is to stimulate an increased movement of freight at class rates rather than at commodity rates, it is apparent that the requirement that the class rates in Official territory be increased runs squarely counter to such a purpose. The reasoning of the majority is inconsistent with itself.

D. The fact that the average rate of return of the railroads in Official territory has been slightly less in recent years than the corresponding average figures for the railroads of the South and West does not support the ultimate finding of undue prejudice and preference in violation of Section 3 (1) or the finding that the present class rates in Official territory are less than minimum reasonable rates in violation of Section 1 (4) and (5) (a) and does not justify the orders requiring an increase in the latter rates.

On page 705 (R. 320), the Commission says that its finding that the present class rates in Official territory should be increased 10 per cent

> "is based in part upon a consideration of the returns from operation of the various respondents in the several territories as reported to us, which we have considered pursuant to stipulations of record. From those returns and the whole record we find and determine that the revenue needs of the carriers in official territory with respect to their class-rate traffic are greater than is the case as to the class-rate traffic of the carriers in the other territories described."

This is a statement that has been previously discussed in this brief. It simply does not make sense.

It is not clear from the language of the report just what figures the Commission referred to, but presumably they are taken from Statistics of Railways as reported by the carriers to the Commission and include the figures in the tables on pages 613 and 657 of the report (R. 228, 272). It is understood that rate of return means the per cent which the net railway operating income from all railroad operations in each territory bears to the total reported investment in railway property used in transportation service by the carriers in that territory plus cash and material and supplies. The figures in the two tables do not appear to correspond, since, for example, the rate of

return for the Eastern district for the year 1941 is shown on page 613 (R. 228) as 3.62 per cent and on page 657 (R. 272) as 5.51 per cent.

In any event, however, just as computations of average costs do not afford proof of the cost of handling class rate freight or of the relative costs of handling such freight in the several territories, so the figures as to rates of return do not afford the slightest proof that the class rates in one territory are less remunerative than those in another or that "the revenue needs of the carriers in official territory with respect to their class-rate traffic are greater than is the case as to the class-rate traffic of the carriers in the other territories described."

In view of the much higher rates for the transportation of raw materials and low-grade freight in Official territory than in the South and in view of the tremendous volumes of coal and iron and steel and other freight moving in Official territory which is not available to the railroads in other territories, it is much more likely that the revenue needs of the carriers in Official territory from their class rate traffic are less than is the case in other territories.

There are other reasons why the majority's statement is wholly arbitrary and without any basis in finding or evidence. Thus there is no finding and no evidence that the figures of property investment, in relation to which the percentages are computed, are arrived at in the same way. There is no proof that the investments are equally proper and necessary. There is neither finding nor proof that they properly represent the values of property to be used as rate bases. Since the cost evidence is no proof of the actual costs of transporting class rate traffic, there is no basis for a finding that the class rates contribute greater or less net revenue in one territory than in another. There is no finding and no evidence that the differences in "rates of return" are not due to passenger

traffic, less-carload freight, or freight moving at commodity or exception rates.

In short, the remark, page 705 (R. 320), that

> "the revenue needs of the carriers in official territory with respect to their class-rate traffic are greater than is the case"

in other territories, is gratuitous, arbitrary, and utterly unsupported by the evidence.

It is submitted, therefore, that such considerations as appear from the report to constitute the factual grounds upon which the majority rest their ultimate finding that the class rates are unlawful because not uniform in all territories are not valid and do not support its determinations.

POINT V

The orders, in requiring a 10 per cent increase in the class rates for transportation in Official territory, in view of the compensatory character of the existing rates, violate Section 15a(2) of the Interstate Commerce Act.

Section 15a(2) requires that the Commission "in the exercise of its power to prescribe just and reasonable rates" shall

> "give due consideration, among other factors * * * to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service."

It is not found, and there was certainly no evidence before the Commission that the class rates for transportation in Official territory were so low as not to be con-

sistent with the furnishing of "adequate and efficient rail way transportation service." On the contrary, as previously argued, the evidence and the Commission's findings demonstrate that the class rates are highly compensatory for the service furnished. Neither is there any suggestion that the service furnished in transporting class rate freight is not "adequate and efficient."

Hence, it is submitted that in ordering that these highly compensatory rates be increased, the Commission failed to obey the mandate of Section 15a(2), and denied to shippers and receivers in Official territory, shipping at class rates, the due consideration required by the Act of their need for railway transportation "at the lowest rates consistent with the furnishing of such service."

POINT VI

The orders are beyond the authority of the Commission, arbitrary and discriminatory in that they would require shippers and receivers in Official territory to pay increased freight rates for the benefit of the railroads in the South. The lower Court erred in not so deciding.

Although not expressly stated, one of the real reasons why the Commission, having decided upon uniformity, has required that it should be accomplished by increasing the level of the class rates in Official territory, is disclosed by several significant portions of the majority's reports.

At pages 607 to 608 of its first report (R. 222, 223), the Commission discussed the evidence bearing upon the effect on the revenues of the Southern railroads which would be produced by substituting the Official territory rates for the rates in the South; in other words, by bringing about equalization on the Official territory level. The Commission pointed out that a witness for the Southern railroads

calculated that if the revenue per ton-mile of the railroads in the Eastern district produced by the rates charged by the carriers in that district for the year 1939 were applied to the traffic handled by the Southern railroads, this would bring about a reduction in their revenues of $40,403,665 for that year. The Commission's cost analyst, according to the report, reworked these figures, making certain adjustments, as the result of which he computed that the revenue loss would be $23,499,831, based on traffic handled in 1939.

On page 634 (R. 249), the Commission, in discussing the so-called Florida arbitraries, set forth a table showing the net railway operating incomes, rate of return and deficits as of three important Southern railroads, the Atlantic Coast Line, Seaboard Air Line, and Florida East Coast, for the years 1927 to 1940, inclusive, and remarked:

> "If these statistics are accepted at their face value, the carriers' need for additional revenues in the years shown is plainly indicated."

At page 696 (R. 311), the Commission said:

> "One of the principal contentions of southern and western respondents, and of certain industrial interests, is that the establishment of the eastern level of class rates in the South and West will require upward revisions of exception, column, and commodity rates in order that the railroads may recoup revenue lost from the reduced class rates. They show that many of the exception and column rates in the South and West are higher than the eastern level of class rates, and contend that establishment of the eastern class-rate level in those territories would require reductions of those exception and column rates which are higher than the eastern class rates, thereby further reducing respondents' revenues. These contentions are directed against the establishment of the eastern class-rate level in the other territories but are not an answer to the claim that the differences

> between the intraterritorial and interterritorial class rates in and between the several territories are not justified by transportation conditions."

Thus it is apparent that the majority of the Commission adopted the expedient of ordering an increase in the class rates in Official territory in furtherance of their purpose "of bringing the several intraterritorial freight-rate structures under consideration closer together in level" (p. 703, R. 318) in order to minimize the revenue loss for the Southern carriers involved in so doing. In short, Official territory shippers would be compelled to pay increased freight rates to carriers in Official territory to prevent reductions in the revenues of the carriers in Southern territory.

The Commission has certain powers under the Act to deal with the freight rates "demanded or collected" of shippers. It may prescribe rates in the light of the revenue needs of the carriers demanding or collecting them. But certainly there is no authority granted to the Commission to find that carrier A must increase the charges which it makes to its shipper X, in order that carrier B may grant equal rates to its shipper Y without depleting its earnings.

Under the orders the Official territory shippers would be compelled to pay more, despite the profitableness of their present rates, to enable the shippers in the South to have equality which the Southern railroads themselves cannot afford to give them. This is discriminatory and arbitrary action.

POINT VII

The Commission's orders represent an attempt to alter economic and industrial conditions and for that reason are beyond the authority of the Commission.

Since the majority's decision and the orders are not sustained by preliminary findings of fact essential to a finding of a violation of the Act, and since the reasons which are given by the majority are wholly inconsistent or fail completely to afford logical support for the decision, it is appropriate to inquire further as to the real basis for the orders.

The circumstances in which the investigation was instituted and conducted cannot be ignored; we have referred to them at the beginning of this argument: the "ground swell of agitation", the "feeling * * * deeply rooted" as to "the basic troubles in the economy", to borrow the language of the Assistant Attorney General in argument in the lower court. We have the word of the Chairman of the Senate Committee on Interstate Commerce that

> "recently the President of the United States appointed a new Interstate Commerce Commissioner. He is the author of a study on freight-rate discriminations. The State of Alabama now has two Commissioners on the Interstate Commerce Commission and both of them are there * * * because of the request and suggestion of the Senator from Alabama." (Congressional Record, p. 5889, Vol. 84, Part 6.)

It has been correctly remarked that the alleged "industrial lag" of the South is "an economic question." Is it not probable that these members of the Commission who "are there * * * because of the request and suggestion of the Senator from Alabama" conceived that they were there to aid in meeting this "economic question"?

The testimony presented by the Southern Governors and the large part of the report devoted to the subject strongly indicate that the decision, which cannot be justified on transporation grounds, really reflects an effort to give effect to the economic theories as to how the "industrial lag" of the South is to be overcome. Although without factual support in the statistics and testimony of record, the method advocated by the "agitation" was to remove the difference in the levels of class rates and thus to encourage industry to shift from the North to the South.

This proceeding was used as the vehicle to accomplish this purpose. Thus, the majority have made their orders responsive to the testimony of Governor Holland of Florida, who after informing the Commission from the witness stand "that the Southern Governors' Conference has been behind the bringing of this case as its principal activity" (R. 2540), stated that he voiced the attitude of all Southern Governors, who had urged that "key industries, vital industries, be decentralized and spread out over vast stretches of the country" (R. 2541). He said:

> "It is our view that the taking of prompt action in this case is necessary so that these war industries will have uniform levels of rates so that at the end of the war they can convert to peactime manufacture, both *to prevent maladjustment in labor population* and the like, and *to keep our nation from* getting back into the old rut, *the old situation of too many key industries in one region,* thus jeopardizing our own security and the peace of the world.
>
> "We feel that no American will say that such efforts to carry out *this new National Policy of distribution or scattering of industry* is other than in the immediate public interest. We feel as well that there is no better time to establish uniform class rates than right now" (R. 2541-2542). (Italics added.)

Governor Cooper of Tennessee also discoursed at length on "the economic ills of the South" and emphasized that "the plea of the Southern Governors • • • is a plea • • •

for national economic stability" (R. 2432). Their demand for equality of class rates for the purpose of "scattering industry" is in accordance with the continuing policy of other southern spokesmen.

As Commissioner Eastman said in his concurring opinion in *Stoves, Ranges, Boilers and House-Heating Furnaces*, 182 I. C. C. 59, 74:

> "However, it is undeniable, I think, that in the past both southern manufacturers and southern carriers have shown a tendency to demand that the rates to the North be equalized in level with those within the North, on the ground that such equalization is commercially essential to the southern industries. It is a sufficient answer to say that it is not our province to equalize commercial conditions. However, the evidence in this case has served a useful purpose in making it quite clear that the southern manufacturers have certain advantages over their northern rivals, so far as operating and overhead costs are concerned, which would have to be taken into consideration if it were our duty to equalize commercial conditions through an adjustment of freight rates."

In the same case the majority said (p. 68):

> "the position of the southern interests is in effect that we should require the northern carriers to join with the southern carriers in joint rates from the South to the North sufficiently low to enable southern manufacturers to obtain an amount of trade in the North satisfactory to them. With this contention we can not agree. It is not within our power to equalize natural disadvantages of locations."

The courts also have held that the Commission has not been endowed with authority to order changes in freight rates for such a purpose.

Judge Parker in *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, in much cited language, said (p. 470):

> "It is perfectly evident * * * that, in reducing the rates from the northern field, and in directing the

cancellation of the reduction from the southern field, the Commission was primarily concerned, not in fixing rates, but in fixing the differential which was to prevail between the two fields * * *. But it must be manifest that increasing the differential to meet such a situation [and the same would be true of decreasing a differential] is not regulation of rates, but regulation of industrial conditions under the guise of regulating rates. * * * it is in essence a regulation of industrial conditions through manipulation of rates.

* * * * * * * * *

"The Commission does not have the right * * * to regulate industrial conditions under the guise of regulating rates.

* * * * * * * * * *

nowhere (in the Act) is it provided that * * * the Commission * * * may fix rates * * * with a view of placing competing producers upon an equality * * *."

In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, at page 637, the Supreme Court used the language previously quoted, in which it said:

"A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously what the carrier may not lawfully do, the Commission may not compel." (Citing various authorities.)

See also *So. Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433; *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42; *United States* v. *Illinois Central Ry.*, 263 U. S. 515, 524.

In the situation here the orders would certainly have the effect of a tariff or duty. They would impose a heavy charge on the doing of business in the appellant states, with the purpose of encouraging industrialists to choose locations in the South or West. Such orders constitute an attempt "to regulate industrial conditions under the guise of regulating rates" and are invalid.

POINT VIII

To the extent that the orders rest on a finding of undue preference and prejudice in violation of Section 3(1) they are invalid because they do not leave the carriers an alternative as to the method of removing the rate differences.

It has been held that the very nature of the offense prohibited by Section 3(1) requires that the carriers shall have an alternative as to the method of removing the prejudice and preference, whether by increasing the preferential rates or reducing the prejudicial rates. And if the circumstances are such that the carriers cannot have an alternative, no violation of Section 3(1) can be found to exist. *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 650.

The only exception to this rule may be in an instance where the lower rates are less than minimum reasonable rates or the higher rates are in excess of maximum reasonable rates.

The Commission's ultimate finding that the class rates within Official territory are less than minimum reasonable rates is a nullity for the reasons outlined in Point I hereof.

And if it be argued that, although the class rates in Official territory are profitable for the railroads in that territory, nevertheless class rates at that level would be inadequate for the railroads in the South and West, this could mean only that there is no violation of Section 3(1), because it would demonstrate that the transportation conditions in the several territories are so different as to justify different rate levels.

Counsel for the Commission and certain of the other defendants, however, argued in the court below, as they

will undoubtedly do before this Court, that where a violation of Section 3(1) is found to exist, the Commission is not required to allow an alternative but has authority to prescribe maximum or minimum rates for the purpose of removing undue preference or prejudice, although such rates may not be unjust and unreasonable within the purview of Section 1 of the Act. This argument rests upon an alleged distinction between orders under Section 3 and orders under Section 15, said to be suggested by the opinion in *Texas & Pacific Ry Co.* v. *United States,* 289 U. S. 627, and by that in *Youngstown Sheet & Tube Co.* v. *United States,* 295 U. S. 476. An examination of these decisions will show that the distinction, to the extent that any exists, is merely verbal and not one of substance.

Section 15(1) provides, in part, that whenever the Commission shall find any rate

> "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial * * * the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist. * * *"

In the *Texas & Pacific* case, *supra,* the Court stated at page 650:

> "Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. Compare *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624; *United States* v. *Penna. R. Co.,* 266 U. S. 191; *Chicago, I. & L. Ry Co.* v. *United States,* 270 U. S. 287, 292; *Minneapolis & St. L. R. Co.* v. *Peoria & Perkin U. R.*

> *Co.*, 270 U. S. 580, 582. The situation must be such that the carrier or carriers if given an option have an actual alternative."

In connection with the first sentence of this statement, it inserted a footnote reading as follows (p. 650):

> "This is not true of an order pursuant to section 15(1) prescribing maximum or minimum or maximum and minimum rates; but the present orders were not issued under that section."

The *Youngstown* case involved the validity of an order of the Commission which required the carriers concerned to increase certain competitive coal rates because the existing rates were unreasonably low. The nature of the findings on which the Commission based its order is, in part, indicated in the Court's opinion on page 480:

> "In the first place the Commission here found the required minimum reasonable; in the second place, it had, after full investigation in this and the Ohio case, held the existing rate structure—built upon certain reasonable key or controlling rates by application of proper differentials—just and reasonable, and the ex-river rates here in issue, in contrast, too low. Comparisons of other rates in the same or adjacent territory, while not a conclusive test of reasonableness of a rate under investigation, have probative value. There was much other evidence bearing upon the character of the service and cost. The order of the Commission was based primarily upon the reasonableness of the minimum prescribed. The existing rate structure furnished support for the finding of reasonableness."

Reference to the Commission's decision, *Bituminous Coal to Youngstown*, 197 I. C. C. 617, 634, will show that it also made a finding that the maintenance of rates on a basis *less* than the prescribed minima would unduly prefer the points from which the rates found unlawful

applied and unduly prejudice other coal origin points. The carriers attacked the Commission's order on two grounds. First, they contended that there was no evidence to support the finding that the rates involved were unreasonably low. The Court dismissed this contention. Then the carriers further contended that the order was a Section 3 order and that it was void because it deprived them of an alternative method of removing discrimination. In answer to this contention the Court stated at page 480:

> "3. There is no merit in the contention that the order was a § 3 order and invalid for failure to afford the carriers an alternative of raising the contested rate or lowering others to remove discrimination. It is true the Commission found prejudice to shippers all rail, but in essence the order entered was a § 15 order and not one made under § 3."

While the Court's opinion does not explicitly indicate such to be the fact, it would seem that the contention made in the *Youngstown* case that the order was a Section 3 order and that, hence the carriers were entitled to an alternative in removing the discrimination, was based upon the assumption that the Commission had erred in finding the rates in issue less than just and reasonable and that, consequently, if any violation existed it was a violation of Section 3(1). As we have seen, however, the Court found that there was ample evidence to support the finding of unreasonableness and the order requiring the establishment of prescribed minimum rates. Since the minima were prescribed under the authority conferred by Section 15(1), the order was referred to as a Section 15 order. In the *Texas & Pacific* case the Court expressly found that there was no basis for the exercise of the minimum rate authority conferred by Section 15 and that, consequently, the carriers were entitled to an alternative in removing the undue preference and prejudice.

Strictly speaking, there is no such thing as a Section 3 order. That section contains no provisions for the making of orders. It is Section 15 that confers authority upon the Commission to make orders requiring the carriers to cease and desist from unlawful acts. The nature of the order which the Commission may make depends upon the precise violation of the Act found to exist, which brings into play the Commission's authority to issue an order to accomplish its removal. For example, it has been the consistent practice of the Commission when it finds that a particular rate or group of rates is unreasonably high or low, in violation of Section 1, to prescribe the maximum or minimum reasonable rates thereafter to be observed. It is recognized, however, that ordinarily there is what is referred to as a zone of reasonableness between the extremes of the maximum and minimum rates permitted by Section 1. *United States* v. *Chicago, M. St. P. & P. Co.*, 294 U. S. 499; *Int. Comm. Comm.* v. *Inland Waterways Corp.*, 319 U. S. 671, 685.

It may happen, as in *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515, and in the *Texas & Pacific* case, *supra*, that the different rates charged two competing shippers, both of which are within the zone of reasonableness, produce undue preference and prejudice, in violation of Section 3. In this event the only function of the Commission is to require the carriers to cease and desist from the discrimination by adjusting the rates to a non-discriminatory basis, and since the rates are within the zone of reasonableness the carriers must be given an alternative as to how the discrimination shall be removed. To deprive them of this alternative would be to deprive them of their right to adjust their rates within lawful limits. *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 506. This is plainly what was meant by the Court in the *Texas & Pacific* and *Youngstown* cases when it referred to an

order made under Section 3, namely, an order pursuant to Section 15(1), which would require nothing more than a removal of a violation of Section 3.

POINT IX

The Court below erred in failing to hold that the evidence does not support the orders which are to take effect in the postwar period, and that the Commission erred in refusing to reopen the proceeding to take evidence as to the present and probable future conditions.

The evidence before the Commission concerning competitive and industrial conditions as they might affect the issues in the proceeding was almost entirely confined to conditions as they existed in 1939 and prior thereto. At one of the final hearings this evidence was supplemented by evidence showing new industries which had located in the South in the year 1941 (Exhibit 219, R. 11676). The cost computations of Dr. Edwards were based upon statistics for the year 1939 and most of the railroad figures in the record were for that year. By stipulation at the oral argument, leave was granted to refer to certain statistics reported by the railroads to the Interstate Commerce Commission for subsequent years, but so far as appears from the report the only later figures cited by the Commission were the percentages of rates of return of the railroads for the years 1942 and 1943 (p. 613, R. 228).

As a consequence, most of the evidence before the Commission on which it could base its decision relates to the prewar era. Since then this country has undergone the tremendous economic and transportation upheaval produced by our participation in World War II, and the nation is still in the throes of another radical change of its economic, industrial and transportation structure re-

sulting from the termination of the war and the reconversion of the country to an economy geared to postwar conditions.

During the course of the proceedings before the Commission, objection was made to the continuance of the investigation on the ground that it would be utterly unrealistic and unreasonable to assume that the evidence which was being presented, based upon conditions before the war and in the very early war years, would afford a fair indication of conditions which would confront the country and its transportation agencies when the war should terminate. Leading railroad executives and others testified that the war conditions as they had even then developed had already changed the movement of traffic and other transportation factors and that they could not predict what the conditions would be after the war (R. 1805, 2070-2080, 2087-2089, 2093, 2094).

In briefs after the conclusion of the evidence, it was again urged upon the Commission that the record would afford no proper basis for orders prescribing rates to take effect and be operative in the future after the termination of the war. When the Commission announced its decision and issued its orders, these contentions were renewed and the Commission was petitioned to reopen the proceedings for the purpose of taking evidence as to changed conditions which had thus far developed as a result of the war. These petitions were denied by the Commission.

Obviously, the Court may and should take judicial notice that the war has occurred; that the United States has participated therein; that the war brought about an almost complete change in our industrial production and in our internal economy and that in the early postwar period this country is facing both world-wide and domestic economic conditions different from those which

obtained before the war. We submit that it should conclude that since the orders are based upon evidence as to conditions before the war and in its early stages, it cannot be assumed that they are responsive to the conditions in which they are supposed to take effect.

In reply it may be argued that in the nature of things the Commission's orders, since they must be based upon evidence, are always predicated upon facts in the past rather than in the future. This is so. But in normal times it may reasonably be assumed that conditions do not so rapidly change that the evidence as to the past may not be accepted as fairly portraying the conditions in which the orders are to operate. But in this case we do not have normal times. The Court must take judicial notice that wars produce such drastic disruptions and changes of economic needs and practices and of industrial processes that the past cannot be fairly assumed to be an indication of the future. We need only refer to the unlimited demand for goods of all kinds in the devastated areas throughout the world to suggest that in the immediate years ahead, when the Commission's orders would take effect, the commerce and industrial production of this country are likely to have an entirely different character and outlook than we have ever known before.

We have previously cited *Atchison, T. & S. F. Ry. Co. v. United States*, 284 U. S. 248, as presenting a parallel to the present case in that there the Commission had acted upon the assumption that a Congressional resolution calling for an investigation of freight rates because of a wave of agitation, changed the substantive law affecting rates. This same case likewise affords a controlling precedent upon the point here discussed. In that case it appeared that following the period covered by the evidence before the Commission there had occurred the nationwide depression of the early 30's. The Commission had been asked to reopen its proceedings for the purpose of receiving

evidence as to the changed conditions produced by that depression, and it had been urged that the evidence did not support the order which was to take effect in such changed conditions. The Commission had declined to reopen. This Court held that this was error. It said (pp. 260-261):

> "There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress, 'a depression such as the country is now passing through is a new experience to the present generation.' The Commission also recognized in that report 'the very large reductions in railroad earnings which have accompanied the economic depression,' and stated that 'the chief cause of these reductions has been loss of traffic.' For 'in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions.'
>
> "It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931. *That record pertains to a different economic era and furnishes no adequate criterion of present requirements.*" (Italics added.)

We submit that the same conclusion is required here. The record before the Commission on which its orders are based "pertains to a different economic era and furnishes no adequate criterion of present requirements."

POINT X

The recent decision and order of the Commission in Ex Parte 162, *Increased Railway Rates, Fares and Charges, 1946*, and the general increases in their freight rates made by the railroads pursuant thereto, have completely altered the rate situation to which the Commission's orders in the *Class Rate Case* were directed and have made those orders obsolete and impossible of enforcement according to their terms so that they should be set aside and permanently enjoined.

The Commission's findings in the *Class Rate Case* were based upon evidence relating to conditions largely as they existed in 1939 and the early war years. Its orders, dated May 15 and October 30, 1945, found unlawful and ordered a 10 per cent increase in the class rates for transportation in Official territory which it referred to in terms as "the existing and current interstate class rates", the "existing applicable interstate class rates" and the "present current applicable" class rates. It ordered "the present rate" in the West and South reduced 10 per cent.

But those rates no longer exist and cannot be increased or reduced. The Commission's orders cannot operate upon the rates which it specified and found unlawful.

This is because of what has recently occurred in the proceeding referred to in the heading to this point, commonly mentioned as *Ex Parte 162*.

In the spring of 1946 the railroads of the country filed with the Commission a petition alleging that because of increases in their operating and other costs since January 1, 1946 their then existing rates were no longer high enough to supply them with adequate revenues to meet their expenses and provide a return on their property used for transportation. They therefore sought authority to increase all of their freight rates 25 percent, subject to certain maxima or exceptions with regard to the rates for the transportation of a few particular commodities.

The Commission by an interim report permitted the railroads to make temporary increases of approximately 6 and 11 percent in their rates for interstate transportation pending final determination. It then held extensive hearings, receiving a large amount of testimony as to increases in railroad costs and increases in freight rates required by the railroads to render their rates reasonable and to provide an adequate return on the values of their properties and also evidence of shippers and others in support of or opposition to increases in rates. On December 5, 1946 the Commission issued its final report and its order pursuant thereto. The Commission proceeded to its ultimate conclusion with the following preface:

> "We therefore pass to our ultimate findings and conclusions. Before stating them, we think the following observations should be made.
>
> There are here involved all the freight rates and charges, and all the passenger fares of the railroads and many other carriers of the Nation, large and small. What we do will directly affect production and distribution in the industries of the Nation, and the welfare of its various regions, as well as the transportation industry. It will have its effect upon the forces tending to economic stabilization or the reverse. We have accorded every reasonable opportunity for those in any way affected to be heard, while pressing the proceeding with as much speed as the size and complexity in detail of the proposals permitted. No case has ever received from us more earnest study."

Its report is far too voluminous to reproduce in this brief but pertinent excerpts from its findings and its order are set out as appendices B and C hereto.

The Commission's findings stressed the changed conditions and increases in costs since January 1, 1946 with which the railroads of the country were confronted.

By its order, the railroads were permitted to increase their class rates 25 per cent in Official territory (the maximum sought by the railroads to render their rates

compensatory in the light of their increased costs), 20 per cent in other territories and 22½ per cent interterritorially. They were authorized to increase their other rates generally 20 per cent with limited increases in the rates for the transportation of certain commodities.

The consequence of this decision, so far as the present case is concerned, is three-fold: (1) the Commission has recognized and found greatly different conditions and factors affecting transportation rates from those in the light of which the decision and orders in this suit were made, (2) the establishment of rates pursuant to Ex Parte 162 has made the rates to which the orders were addressed non-existent, and (3) the effect of enforcement of the order in the *Class Rate Case* upon the present day rates would produce results which plainly were not contemplated thereby.

On this latter point, for example, if the order in the Class Rate Case were now given effect with regard to the rates resulting from Ex Parte 162, the consequence would be an increase of 37½ per cent in the class rates for transportation within Official territory over the rates in effect when the order was made in 1945, and an increase of only 8 per cent in the class rates for transportation within the South and West. This would be a very different result from that contemplated by the orders in the Class Rate Case at the time they were made.

Again in the Class Rate Case the Commission gave as its principal reason for its interim order and for bringing about its approach to uniformity by increasing the class rates in Official territory as well as by reducing the class rates in other territories, the comparatively lower rate of return upon property investment of the railroads in Official territory which the Commission evidently construed as indicating a greater revenue need. The whole purpose of Ex Parte 162, however, was to provide additional revenues for the railroads and the Com-

mission in its report in that proceeding has discussed the comparative rates of return of the railroads in the several territories at great length. It is clear from the findings in Ex Parte 162 that by allowing an increase of 25 per cent in the class rates of the railroads in Official territory while permitting an increase of only 20 per cent in the corresponding rates of the railroads in the South and West, the Commission was seeking to equalize the rates of return on property investment of the railroads in the several territories. In any event, the Commission has taken comparative rates of return into account and has thereby altered the basic revenue situation upon which the Commission predicated its order in the *Class Rate Investigation* which would have required a 10 per cent increase in the class rates in Official territory and a reduction in other territories.

In the *Class Rate Investigation* the Commission attempted to bolster its order requiring a 10 per cent increase in the class rates for transportation within Official territory by a finding in its supplemental report that the class rates which it ordered increased were less than just and reasonable rates (p. 158, R. 477). Whether or not such a finding was justified by evidence relating largely to 1939, it is impossible to see how those rates increased 25 per cent, which was the maximum increase which the Commission permitted to be made pursuant to the decision in Ex Parte 162, can now be less than minimum, just and reasonable rates. Especially is this so since the present rates reflecting the 25 per cent increase are the maximum rates which the railroads in Official territory asked authority to establish and which the Commission has said represents the highest reasonable rates and since the Commission in Ex Parte 162 has found the increased rates to be just and reasonable.

Finally, on this point the interim orders in the *Class Rate Investigation* to which these suits are addressed were,

according to the Commission's report, designed as an approach to that uniformity of class rates throughout the country which it was the aim of the Commission ultimately to achieve. This uniformity was to be based upon the mileage scale set out at page 704 of the Commission's report (R. 319). The Commission's action in Ex Parte 162, however, has made that mileage scale a relic of the past. It is so much lower than the class rates which the Commission has now permitted the carriers to establish that it cannot be assumed that the Commission longer intends it to be the basis of the uniform class rates ultimately to be established. Nor can it be said that it is intended that the mileage scale shall itself be increased by the amounts of the percentage increases permitted by the order in Ex Parte 162. Is it to be increased 20 percent, the amount of the increase permitted in class rates in Southern and Western territories, or is it to be increased to 25 percent, the amount of the increase in class rates authorized in Official territory? If either of these alternatives were adopted, the resulting rates would be vastly different from those which the Commission has permitted. On the other hand, if the scale were subjected to both increases, namely, 20 percent, as applied to the rates for transportation in Southern and Western territories, and 25 per cent, as applied to transportation in Official territory, it would cease to be a uniform mileage scale. Consequently, the ultimate uniformity contemplated by the decision in the *Class Rate Case* can now no longer be achieved on the basis found by the Commission in that case to be just and reasonable, and if there is to be uniformity, further findings as to the basis upon which such uniformity shall be accomplished are necessary. This being so, the interim orders, to which this suit is addressed, can no longer be deemed orders to accomplish an approach to the uniformity to be ultimately brought about on the basis of the mileage scale.

It is submitted, therefore, that the order in Ex Parte 162 and the making effective of a 25 percent increase in class rates for transportation in unofficial territory and a 20 percent increase in the class rates for transportation in western and southern territories have so altered the entire rate situation that apart from all other considerations it cannot now be assumed that the Commission's order in the *Class Rate Investigation*, which is the subject of these suits, is designed to take effect under such conditions. Nor can it do so by its own terms. Hence, it should be annulled and enjoined.

Conclusion

For the reasons set forth herein, appellants ask that the judgment of the court be reversed, that the Commission's orders be held unlawful, and that the case be remanded to the District Court with direction to annul, set aside and permanently enjoin the orders.

Respectfully submitted,

PARKER MCCOLLESTER,
KENNETH L. SATER,
Attorneys for Appellant States.

NATHANIEL L. GOLDSTEIN
Attorney General, State of New York

FRANK J. CLARK
Special Assistant Attorney General, State of New York

CLAIR JOHN KILLORAN
Attorney General, State of Delaware

JAMES A. EMMERT
Attorney General, State of Indiana

KARL J. STIPHER
Deputy Attorney General, State of Indiana

HALE HAMMOND
Attorney General, State of Maryland

FOSS O. ELDERE
Attorney General, State of Michigan

JAMES W. WILLIAMS
Assistant Attorney General, State of Michigan

WALTER D. VAN RIPER
Attorney General, State of New Jersey

ROBERT PEACOCK
Deputy Attorney General, State of New Jersey

HUGH S. JENKINS
Attorney General, State of Ohio

JOHN E. MARTIN
Attorney General, State of Wisconsin

HERBERT T. FERGUSON
Assistant Attorney General, State of Wisconsin

JAMES H. DUFF
Attorney General, Commonwealth of Pennsylvania

E. A. DELANEY
Deputy Attorney General,
Commonwealth of Pennsylvania

Of Counsel

Appendix A

Excerpts from Pertinent Statutes

Interstate Commerce Act

Section 1 (4):

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

* * *

Section 1(5):

"(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

* * * *

Section 3(1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any par-

ticular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

* * *

Section 15(1):

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate,

fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

* * *

Section 15a.(2):

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

Transportation Act, 1940

Section 5(b):

"The Interstate Commerce Commission is authorized and directed to institute an investigation into the rates on manufactured products, agricultural commodities, and raw materials, between points in one classification territory and points in another such territory, and into like rates within any of such territories, maintained by common carriers by rail or water subject to part I of the Interstate Commerce Act, as amended, for the purpose of determining whether said rates are unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist: *Provided*, That the Commission in its discretion may confine its investigation to such manufactured products, agricultural commodities, and raw materials, and the rates thereon as shippers thereof may specifically request be included in such investigation."

Appendix B

EXCERPTS FROM FINDINGS IN EX PARTE 162

"From a consideration of the entire record in these proceedings, we conclude and find:

"1. It is requisite for the carrying out of the purposes of the national transportation policy, and the development, coordination, and preservation of a national transportation system adequate to meet the needs of commerce, the postal service, and the national defense, and in order that freight rates and charges shall be such as to move the greatest volume of traffic, while providing adequate and efficient transportation at the lowest cost consistent with the furnishing of such service, and to enable the petitioning carriers by railroad and by water under honest, economical, and efficient management to provide such service, that there be substantial increases in the basic freight rates and charges of the petitioners, and the continued maintenance of the present temporarily increased basis of passenger fares and charges. That the basic freight rates and charges, and passenger fares and charges, increased or authorized to be continued in the manner and to the extent herein found and approved in detail, will be just and reasonable, but that the full amount of the increases in the form proposed in the petition in Ex Parte No. 162 have not been shown to be just and reasonable, in respects not herein approved.

"2. Except as otherwise specifically provided in these findings or in the appendix thereto, all basic freight rates and charges of the petitioning rail and water carriers justly and reasonably may be increased for the future by 20 percent. By basic freight rates and charges are meant those now in effect, whether established by order of the Commission or voluntary act of the petitioning carriers (including rates held under investigation and suspension orders)—excluding, however, from such freight rates and charges as now in effect such portion thereof as represents the interim increases authorized by the report and order entered herein on June 20, 1946. Basic freight rates and charges include also rates prescribed by outstanding orders of the Commission, when and as the rates therein prescribed become effective, subject to any exceptions specifically noted herein."

* * * * *

"4. The following increases in the basic freight rates and charges for miscellaneous services will be just and reasonable for the future:

"Except as otherwise provided in appendix 1, rates on articles under the general commodity grouping of Manufactures and Miscellaneous, class rates and rates on less-than-carload and any-quantity traffic may be increased 25 percent within official territory, as defined in our prior (interim) report at page 743, 20 percent within and between other territories, and 22.5 percent between official territory and points in other territories."

* * * * * *

"20. Appropriate orders for relief under sections 4 (1), 6, 217, 306, and 405 of the Interstate Commerce Act will be entered; except as specified in the following sentence of this finding our outstanding orders will be modified accordingly. As the effectiveness of our order in *Class Rate Investigation, 1939*, docket No. 28300, is now stayed and enjoined, we do not hereby in any manner suspend or supersede, or modify or affect the findings and order entered in that proceeding."

* * * * * *

"APPENDIX 1

"Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of Division Four of November 22, 1927, *In the Matter of Freight Commodity Statistics*, which was in effect at the date of the submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated by order of Division One, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission."

Appendix C

INTERSTATE COMMERCE COMMISSION'S ORDER IN EX PARTE 162

"ORDER

"At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of December, A. D. 1946.

"EX PARTE NO. 162

INCREASED RAILWAY RATES, FARES, AND CHARGES, 1946

"EX PARTE NO. 148

INCREASED RAILWAY RATES, FARES, AND CHARGES, 1942

"*It appearing,* That further supplemental petitions have been filed, further hearings have been held, and parties have been heard in oral argument and upon briefs filed October 25, 1946;

"*And it further appearing,* That the Commission, on the date hereof, has made its report in these proceedings containing its findings of fact and conclusions thereon, which said report, together with the reports heretofore made in these proceedings, are hereby referred to and made a part hereof;

"*It is ordered,* That the increased freight rates and charges therein authorized shall supersede and be in lieu of the emergency increases authorized in the prior report of June 20, 1946. The authorized increased rates and charges may be made effective during the period from January 1, 1947 to February 28, 1947, upon not less than five days' notice to the Commission and to the general public, by filing and posting in the manner prescribed in the Interstate Commerce Act;

"*It is further ordered,* That outstanding unexpired orders in other proceedings are hereby modified so as to permit the increases in freight rates and charges herein authorized to be established; *Provided,* however, that the provisions of this paragraph shall not be construed to suspend

or supersede or modify or affect the findings and order entered in *Class Rate Investigation, 1939,* Docket No. 28300, the operation of which is stayed by court order;

"*It is further ordered,* That rates, increased as authorized herein, within official territory from and to border points, may be applied as a minimum on interterritorial traffic through such border points to the extent necessary to conform to the provisions of section 4(1) of the act, in like manner as was authorized in the prior report of June 20, 1946;

"*It is further ordered,* That the authorization contained in the report and order of June 20, 1946, respecting increased rates on iron ore to the upper lake ports and increased handling charges on iron ore at those ports, is hereby cancelled effective January 1, 1947;

"*It is further ordered,* That the increase in passenger fares authorized by the order in Ex Parte No. 148, dated January 21, 1942, as modified by the order in Ex Parte No. 148, dated October 20, 1945, be, and it is hereby, continued in effect without expiration date;

"*And it is further ordered,* That all tariffs or supplements changing rates or charges under the authority of this order, which rates or charges are now maintained or held in force by virtue of outstanding orders of the Commission, shall bear on their title pages specific reference to this order:"

Certificate of Service

I hereby certify that copies of the foregoing brief were this day mailed to the following conusel of record:

Tom C. Clark, Attorney General
Department of Justice
Washington, D. C.

Philip B. Perlman, Solicitor General
Department of Justice
Washington, D. C.

Wendell Berge, Assistant Attorney General
Department of Justice
Washington, D. C.

Edward H. Miller, Special Assistant to the Attorney General
Department of Justice
Washington, D. C.

David O. Mathews, Special Assistant to the Attorney General
Department of Justice
Washington, D. C.

Daniel W. Knowlton, Chief Counsel
Interstate Commerce Commission
Washington, D. C.

Edward M. Reidy, Assistant Chief Counsel
Interstate Commerce Commission
Washington, D. C.

J. V. Norman
Kentucky Home Life Building
Louisville, Kentucky

Byron M. Gray
608 National Bank of Topeka Building
Topeka, Kansas

George T. Simpson
State Capitol Building
St. Paul, Minnesota

Certificate of Service.

C. B. Bee
State Capitol
Oklahoma City 5, Oklahoma

Walter R. McDonald
Georgia Public Service Commission
Atlanta, Georgia

Douglas F. Smith
11 South LaSalle Street
Chicago, Illinois

H. C. Barron
Western Traffic Executive Committee
Room 310, Union Station
Chicago, Illinois

Henry E. Foley
10 Post Office Square
Boston, Massachusetts

Dated this 8th day of February, 1947.

PARKER MCCOLLESTER,
Of Counsel for Above Named
Appellant States.